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Mr SERJEANT STEPHEN'S

NEW

COMMENTARIES

ON

THE LAWS OF ENGLAND.

(PARTLY FOUNDED ON BLACKSTONE.)

"*For hoping well to deliver myself from mistaking, by the order and perspicuous expressing "of that I do propound, I am otherwise zealous and affectionate to recede as little from "antiquity, either in terms or opinions, as may stand with truth, and the proficience of know-"ledge.*"—Lord Bac. Adv. of Learning.

The Seventh Edition,

BY

JAMES STEPHEN, ESQ., LL.D.,

JUDGE OF COUNTY COURTS,

LATE PROFESSOR OF ENGLISH LAW AT KING'S COLLEGE, LONDON,

AND FORMERLY RECORDER OF POOLE.

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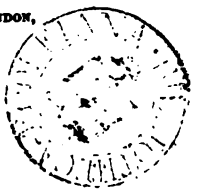

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NEW COMMENTARIES

ON

THE LAWS OF ENGLAND.

BOOK IV.

OF PUBLIC RIGHTS—(*continued*).

PART III.

OF THE SOCIAL ECONOMY OF THE REALM.

In our examination of Public Rights, we have treated successively of the *Civil Government* and of the *Church*. But there are many other institutions which belong, equally with these, to the division of Public Rights,—as relating immediately to the community at large, or to large classes of it, and not merely to the individual; and which yet, as having no connection with the subject of government, whether civil or ecclesiastical, have hitherto found no proper place in our disquisitions. In conformity with the division already laid down, these may be designated without impropriety (though perhaps without sufficient authority) as the laws of *Social Economy*;—and the following Part of the present Book will be devoted to the examination of them under their principal heads (*a*).

(*a*) Vide sup. vol. II. p. 316.

CHAPTER I.

OF THE LAWS RELATING TO CORPORATIONS.

THE principle of those social institutions, called bodies corporate (*corpora corporata*) or corporations, has already been in some measure explained (*a*); and we have seen that they are artificial persons created by the law, and endowed by it with the capacity of perpetual succession (*b*).

[Of corporations there is a great variety, subsisting for the advancement of religion, of learning, or of commerce; in order to preserve entire and for ever those rights and immunities, which, if they were granted only to those individuals of which the body corporate is composed, would upon their death be utterly lost and extinct. To show the advantages of these incorporations let us consider the case of a college in any of our universities, founded *ad studendum et orandum*, for the encouragement and support of religion and learning. If this were a mere voluntary assembly, the individuals which compose it might indeed pray, study, and perform scholastic exercises together, so long as they could agree to do so; but they could neither frame nor receive any laws or rules of their conduct—none, at least, which would have any binding force, for want of a coercive power to create a sufficient legal obligation.

So also with regard to holding estates or other property, if land be granted for the purposes of religion or learning to twenty individuals not incorporated, there is

(*a*) Vide sup. vol. I. pp. 124, 358, 454, 473.

(*b*) Vide sup. vol. I. p. 358.

[no legal way of continuing the property to any other persons for the same purposes, but by endless conveyances from one to the other as often as the hands are changed.

But when such grantees are consolidated and united into a corporation, they and their successors are then considered as one person in law: as one person, they have one will, which is collected from the sense of the majority of the individuals: this one will may establish rules and orders for the regulation of the whole, (which are a sort of municipal laws of this little republic;) or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws (*c*). Again, the privileges and immunities, the estates and possessions of the corporation, when once vested therein, will remain for ever vested, without any new conveyance to new successors. For all the individual members that have existed from the foundation to the present time, or that shall ever after exist, are but one person in law, a person that never dies; in like manner as the river Thames is still the same river, though the parts which compose it are changing every instant.

The honour of originally inventing these political constitutions entirely belongs to the antient Romans. They were introduced, as Plutarch says, by Numa; who finding, upon his accession, the city torn to pieces by the two rival factions of Sabines and Romans, thought it a prudent and politic measure to subdivide these two into many smaller ones, by instituting separate societies of every manual trade and profession. They were afterwards much considered by the civil law, in which they were called *universitates*, as forming one whole out of many individuals; or *collegia*, from being gathered together (*d*). They were adopted also by the canon law, for the maintenance of ecclesiastical discipline; and from

(*c*) 1 Bl. Com. p. 468. (*d*) Ff. l. 3, t. 4, per tot.

[them our spiritual corporations are derived. But our laws, according to the usual genius of the English nation, have considerably refined and improved upon the invention, —particularly with regard to sole corporations, or such as consist of one person only,—of which the Roman lawyers had no notion; their maxim being that *tres faciunt collegium* (*f*): though they also held that if a corporation originally consisting of three persons be reduced to one, *si universitas ad unum redit*, it may still subsist as a corporation, *et stet nomen universitatis* (*g*).]

Before we proceed to say more of corporations, it will be expedient to take a view of the several sorts of them; but here we must premise the general remark, that we have no intention for the present to take any notice of those kinds which may be created (as will appear hereafter) under modern statutes, with new and peculiar incidents by way of innovation upon the principles of the common law; but mean to confine ourselves, in the first instance, to corporations that are governed by those principles,—or, in other words, to corporations ordinarily and properly so called.

[The first division of corporations is into *aggregate* and *sole*. Corporations *aggregate* consist of many persons united together into one society, and are kept up by a perpetual succession of members so as to continue for ever—of which kind are the mayor and commonalty of a city, the head and fellows of a college, the dean and chapter of a cathedral church. Corporations *sole* consist of one person only and his successors, in some particular station; who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the sovereign is a sole corporation; so is a bishop; so are some deans distinct from their several chapters; and so is every rector and

(*f*) Ff. 50, 16, 8, 9. (*g*) Ff. 3, 4, 7.

[vicar (*h*). And the necessity, or at least use, of this institution will be very apparent, if we consider the case of the parson of a church. At the original endowment of parish churches the freehold of the church, the churchyard, the parsonage-house, the glebe, and the tithes of the parish, were vested in the parson by the bounty of the donor, as a temporal recompence to him for his spiritual care of the inhabitants; and with intent that the same emolument should ever afterwards continue as a recompence for the same care. But how was this to be effected? the freehold was vested in the parson; and if we supposed it vested in its natural capacity, on his death it might descend to his heirs, and would be liable to his debts and incumbrances: or at least the heir might be compellable, at some trouble and expense, to convey these rights to the succeeding incumbent. The law, therefore, has wisely ordained that the parson, *quatenus* parson, shall never die, any more than the sovereign—by making him and his successors a corporation. By which means all the rights of the parsonage are preserved entire to the successor; for the present incumbent and his predecessor who lived eight centuries ago, are in law one and the same person: and what was given to the one, was given to the other also.

Another division of incorporations is into *ecclesiastical* and *lay* (*i*). Ecclesiastical (or spiritual) corporations are where the members are entirely spiritual persons, such as bishops, parsons, and the like; which are corporations sole. But there are also ecclesiastical corporations aggregate; as deans and chapters at the present day (*k*); and formerly,

(*h*) Co. Litt. 43. It has been determined that a "vicar choral" is a corporation *sole*, and as such liable to his successors for dilapidations in his house of residence. (Greaves *v.* Parfitt, 7 C. B. (N. S.) 838.)

(*i*) As to *ecclesiastical* corporations, considered in reference to their power of alienation and of holding land, vide sup. vol. I. pp. 454—463, 473, et post, pp. 16, 17. As to *lay* incorporations in reference to the same subject, vide sup. vol. I. pp. 454, 473, 474.

(*k*) Some *deans* (as distinct from their chapters) are corporations sole. (1 Bl. Com. p. 470.)

[prior and convent, abbot and monks. All these are erected for the furtherance of religion, and perpetuating the rights of the Church.

Lay (or temporal) corporations again are of two sorts, *civil* and *eleemosynary*. The *civil* are such as are erected for a variety of temporal purposes. The sovereign, for instance, is a corporation sole, in order to prevent an *interregnum*, or vacancy of the throne on death, and to preserve the possessions of the crown entire (*l*). Other lay corporations are erected for the good government of a town or particular district,—as a mayor and commonalty, bailiff and burgesses, and the like.] And these are now commonly denominated municipal corporations, of which we shall have occasion to speak more at large before the conclusion of this chapter. Others, again, are established for the advancement and regulation of manufactures and commerce,—as the trading companies (or guilds) of London and other towns,—or for the better carrying on of divers special purposes;—as the royal College of Physicians, the royal College of Surgeons of England, the Royal Society for the advancement of natural knowledge (*m*), the Society of Antiquaries, and a variety of others. [And among the same class of lay incorporations, the general corporate bodies of Oxford and Cambridge must be ranked (*n*). For it is clear they are

(*l*) Vide sup. vol. II. p. 478.

(*m*) See Beaumont *v.* Oliveira, Law Rep., 6 Eq. Ca. 534; 4 Ch. App. 309.

(*n*) Rex *v.* Cambridge Vice-Chancellor, 3 Burr. 1656. It may be worth remark here, that under the 17 & 18 Vict. c. 81 (the Act of 1854), the government of the university of Oxford is mainly vested in the *Hebdomadal Council*, a body consisting of twenty-two persons, of whom four are *ex officio* members (the chancellor, the vice-chancellor, and the two proctors), and the other eighteen are elected, viz., six from the heads of houses, six from the professors, and six from masters of arts of not less than five years' standing; and that, under the 19 & 20 Vict. c. 88 (and see 32 & 33 Vict. c. 20), the government of the university of Cambridge is, in like manner, vested in the *Council of the Senate*, consisting of eighteen persons, of whom two are *ex officio* members (the chancellor and the vice-chancellor), and

[not ecclesiastical corporations, being composed of more laymen than clergy: neither are they eleemosynary foundations, though stipends therein are annexed to particular magistrates and professors, any more than other corporations, where the acting officers have standing salaries. For these are rewards *pro opere et labore*, not charitable donations only, since every stipend is preceded by service and duty.

The *eleemosynary* sort of lay incorporations, are such as are constituted for the perpetual distribution of the free alms or bounty of the founder of them, to such persons as he has directed. Of this kind are hospitals for the maintenance of the poor, sick and impotent, and all colleges both in our universities and out of them (*o*); for such colleges are founded for two purposes: 1. For the promotion of piety and learning by proper regulations and ordinances. 2. For imparting assistance to the members of those bodies, in order to enable them to prosecute their devotion and studies with greater ease and assiduity. And all these eleemosynary corporations, though in some things partaking of the nature of ecclesiastical bodies, are strictly speaking lay and not ecclesiastical, even though composed of ecclesiastical persons (*p*).] And accordingly they are not subject to the jurisdiction of the Ecclesiastical Courts, or to the visitation of the ordinary (or diocesan) in his spiritual character (*q*).

[Having thus marshalled the several species of corporations, let us next proceed to consider—I. How corporations may be created. II. Their powers, capacities and

the other sixteen are elected, viz., four heads of colleges, four professors, and eight other members of the senate. As to these universities, see also 19 & 20 Vict. c. 31; cap. xvii; 21 & 22 Vict. cc. 11, 44; 22 & 23 Vict. c. 19; 23 Vict. c. 23; 23 & 24 Vict. cc. 59, 91; 25 & 26 Vict. c. 26.

(*o*) Such as the colleges at Eton, Winchester, Manchester, &c. As to Eton, see 19 & 20 Vict. c. 88; 22 & 23 Vict. c. 34.

(*p*) See 1 Bl. Com. 470; Philips *v.* Bury, 1 Ld. Raym. 6.

(*q*) Christian's Blackstone, vol. i. p. 472 (note).

[incapacities. III. How corporations are visited. IV. How they may be dissolved.

I. Corporations, by the civil law, seem to have been created by the mere act and voluntary association of their members; provided such convention was not contrary to law, for then it was *illicitum collegium* (*r*). It does not appear that the prince's consent was necessary to be actually given to the foundation of them: but merely that the original founders of these voluntary societies,—for they were little more than such,—should not establish any meetings in opposition to the laws of the state. But with us in England, the sovereign's consent (express or implied) is absolutely necessary to the erection of any corporation.

The crown's *implied* consent is to be found in corporations which exist by force of the *common law*, to which our former kings are supposed to have given their concurrence. Of this sort are the sovereign himself, and also all ecclesiastical corporations sole, such as bishops, parsons and other incumbents of churches (*s*); who by common law have been held, (as far as our books can show us,) to have been corporations *virtute officii*. And this incorporation is so inseparably annexed to their offices that we cannot frame a complete legal idea of any of these persons, but we must also at the same time have an idea of a corporation, capable to transmit his rights to his successors. Another method of implication, whereby the crown's consent is presumed, is as to all corporations by *prescription*, such as the city of London and many other, which have existed as corporations, time whereof the memory of man runneth not to the contrary; and therefore are looked upon in law to be well created (*t*).

(*r*) Ff. 47, 22, 1.

(*s*) Blackstone (vol. i. p. 472) enumerates *churchwardens* also. But these are only a *quasi* corporation, as he himself remarks, ibid. p. 394. And see Smith *v.* Adkins, 8 Mee. & W. 362.

(*t*) 2 Inst. 330. Vide sup. vol. I. p. 57.

[For though the members thereof can show no legal charter of incorporation, yet, in cases of such high antiquity, the law presumes there once was one; but that, by the variety of accidents which a length of time may produce, the charter has been lost or destroyed.

The methods by which the crown's consent is *expressly* given, are either by act of parliament or charter. By act of parliament, (of which the royal assent is an indispensable ingredient,) corporations may undoubtedly be created; as well as by royal charter (*u*).] But it is observable that the authority of parliament, as regards their creation, has been frequently exercised only in aid or corroboration of the royal prerogative (*x*). As when the charter of the Royal College of Physicians, (of the tenth year of Henry the eighth,) was afterwards confirmed by

(*u*) We may remark here, that in acts of parliament for creating or regulating corporations, (which are very frequent in connection with municipal improvements, and with railway, canal, dock companies and similar undertakings,) it has latterly been usual, when certain objects of an ordinary kind are in view, to introduce an adoption, in general terms, of certain *other* Acts, consolidating the provisions usually made by parliament in reference to such objects. These consolidating Acts are chiefly—The Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16); The Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18, amended by 23 & 24 Vict. c. 106, and 32 & 33 Vict. c. 18); The Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20); The Commissioners Clauses Act, 1847 (10 & 11 Vict. c. 16); The Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27); The Towns Improvement Clauses Act, 1847 (10 & 11 Vict. c. 34); The Railway Clauses Act, 1863 (26 & 27 Vict. c. 92); The Waterworks Clauses Acts, 1847 and 1863 (10 & 11 Vict. c. 17, and 26 & 27 Vict. c. 93); The Telegraph Act, 1863 (26 & 27 Vict. c. 112); The Companies Clauses Act, 1863 (26 & 27 Vict. c. 118); The Railway Companies Powers Act (27 & 28 Vict. c. 120); The Railway Construction Facilities Act, 1864 (27 & 28 Vict. c. 121); The Companies Clauses Act, 1869 (32 & 33 Vict. c. 48).

(*x*) By 34 & 35 Vict. c. 63 (The College Charter Act, 1871), it is provided that charters for the foundation of new colleges and universities, which may be referred by her Majesty in council for the consideration and report thereon of the Privy Council, shall be laid before parliament for a period of not less than thirty days before the report shall be submitted to her Majesty.

the statute 14 & 15 Hen. VIII. c. 5 (*a*). Or when the Crown was permitted by statute 5 & 6 W. & M. c. 20, to erect the corporation of the Bank of England with certain powers. Or when by the more recent statute of 5 & 6 Will. IV. c. 76, it was enacted, that, upon petition of the inhabitant householders of any borough in England or Wales, the king might, by his charter, incorporate such borough according to the provisions of that Act (*b*).

[The creation by the Crown of a body corporate may be performed by the words *creamus, erigimus, fundamus, incorporamus*, or the like. Nay, it is held that if the crown grants to a set of men to have *gildam mercatoriam*, a mercantile meeting or assembly (*c*), this is also sufficient to incorporate and establish them for ever (*d*).

The Crown, (it is said,) may grant to a subject the power of erecting corporations, though the contrary was formerly held (*e*). That is, it may permit the subject to name the persons and powers of the corporation at his pleasure; but it is really the sovereign that erects, and the subject is but the instrument: for, though none but the Crown can make a corporation, yet *qui facit per alium, facit per se*. In this manner, the Chancellor of the University of Oxford has power by charter to erect corporations; and has actually often exerted it, in the

(*a*) See Dr. Bonham's case, 8 Rep. 107.

(*b*) See Rutter *v.* Chapman, 8 Mee. & W. 1.

(*c*) *Gild* signified among the Saxons a fraternity, and was derived from the verb ȝilban, to pay, because every man paid his share towards the expenses of the community. Such of these gilds as were commercial gradually took the shape of our present municipal corporations; whose place of meeting, it may be observed, is still called the *Guild-hall*. Some curious information as to the Anglo-Saxon gilds or clubs will be found in Turner's Hist. Ang. Sax. vol. iii. p. 98, 6th ed.; where mention is made, among other instances, of a gild of the clergy at Canterbury, and a gild of thegns at Cambridge.

(*d*) 10 Rep. 30; 1 Roll. Ab. 513.

(*e*) Bro. Ab. tit. Prerog. 53; Vin. Prerog. 88, pl. 76; Year Book, 2 Hen. 7, 13. And see by Lord Kenyon, R. *v.* Coopers' Company, 7 T. R. 548.

[erection of several matriculated companies of tradesmen subservient to the students.

When a corporation is erected, a name is always given to it (*f*), or, supposing none to be actually given, will attach to it by implication; and by that name alone it must sue and be sued, and do all legal acts. Yet a very minute variation therein is not material; and the name is capable of being changed, by competent authority (*g*), without affecting the identity or capacity of the corporation in other respects (*h*). But some name is the very being of its constitution; and though it is the will of the sovereign that erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions (*i*). The name of incorporation, says Sir E. Coke, is as a proper name or name of baptism: and therefore when a private founder gives his college or hospital a name, he does it only as a godfather; and by that same name the king baptizes the incorporation (*k*).]

II. A corporation has incident thereto a variety of powers, rights, capacities and incapacities; the greater part of which are in their nature applicable only to corporations *aggregate:* though some belong to either class. These shall be now briefly considered.

1. A corporation aggregate may sue or be sued, implead or be impleaded, grant or receive, and, in short, perform any act by the corporate name, as a natural person may by his individual name. 2. And, as a corollary from this, it is amenable, in respect of the corporate property only, to such judgments as shall be given against it in any action; and not so as to fix any personal or individual

(*f*) Blackstone (vol. i. p. 475), says a name *must* be given; but it appears by 1 Salk. 191, that a name of incorporation may be *implied.*

(*g*) See Queen *v.* Registrar of Joint-Stock Companies, 10 Q. B. 839.

(*h*) 4 Rep. 87.

(*i*) Gilb. Hist. C. P. 182.

(*k*) 10 Rep. 28.

liability on the corporators (*l*). 3. [The acts of a corporation aggregate must be under its common seal; for, being an invisible body, it cannot manifest its intentions by any personal act or oral discourse; and therefore acts and speaks only by its common seal. For though the particular members may express their private consents to any act, by words or signing their names, yet this does not bind the corporation. It is the fixing of the seal, and that only, which unites the several assents of the individuals who compose the community, and makes one joint assent of the whole (*m*).] There are cases, however, in which convenience has introduced an exception to this rule. For example, a corporation may (through its head) give command to a bailiff to make a distress, or may retain a solicitor (*n*); and these acts need not be authenticated under the common seal (*o*). And it has been also held that an action will lie against a corporation on an executed contract of which it has received the benefit, although such contract was not under the common seal (*p*). 4. [A corporation aggregate may make bye-laws or private statutes for its own better government (*q*); and these are

(*l*) The maxim of the civil law is the same: "*Si quid universitati debetur, singulis non debetur; nec quod debet universitas, singuli debent.*"—Ff. 3, 4, 7.

(*m*) Dav. 44, 48. See the following cases as to the necessity (in general) that the acts of a corporation should be under seal: Governor and Company of Copper Mines *v.* Fox and others, 16 Q. B. 229; Cort *v.* Ambergate, &c., Railway Company, 17 Q. B. 127; Diggle *v.* London and Blackwall Railway Company, 5 Exch. 442. As to the use of the common seal, by an *ecclesiastical* corporation aggregate, see 5 & 6 Vict. c. 108, s. 27.

(*n*) See Mallam *v.* Guardians of the Poor of Oxford, 2 Ell. & Ell. pp. 192, 208.

(*o*) Lutw. 1497; 1 Salk. 191.

(*p*) Nicholson *v.* Bradfield Union, Law Rep., 1 Q. B. 620; contra, Smart *v.* Guardians of the West Ham Union, 10 Exch. 867. As to the contracts of *registered joint stock companies*, see 30 & 31 Vict. c. 131, s. 37. A trading company may contract without seal with respect to those matters for which they are incorporated. (South of Ireland Colliery Company *v.* Waddle, Law Rep., 3 C. P. 463; 4 C. P. 617.)

(*q*) Blackstone adds that the same right was recognized by the law of the Twelve Tables at Rome. (1 Bl. Com. 476.)

[binding on the members, unless contrary to the laws of the land (*r*), or contrary to or inconsistent with their charter (*s*), or manifestly unreasonable (*t*). For as natural reason is given to the natural body for the governing it, so bye-laws or statutes are a sort of political reason to govern the body politic.] And this is held to be a right so much of course, that where a charter of incorporation gave to a select body of the members a power to make bye-laws as to certain specified matters, it was held that the body at large was nevertheless at liberty to legislate with regard to all matters not so specified (*u*). Every corporation, too, has a right, as of course, to alter or repeal the bye-laws which itself has made (*x*). 5. Among the incidents of a corporation aggregate may also be classed the *disabilities* to which it is subject; and these may compendiously be stated as follows. [It must always appear in court by attorney, for it cannot appear in person, being, as Sir E. Coke remarks, invisible, and existing only in intendment and consideration of law (*y*). It cannot be executor or administrator, nor, indeed, perform any personal duties. Nor can it be seised of lands to the use of another; for such kind of confidence is foreign to the end of its institution (*z*).] And, as the general rule, it can be guilty of no crime in its corporate capacity (*a*).

(*r*) Thus a bye-law, limiting the number of apprentices which each member shall take, is void. (R. *v.* Coopers' Company, 7 T. R. 543.) And see 19 Hen. 7, c. 7, and Ipswich Taylors' Case, 11 Rep. 53.

(*s*) See Rex *v.* Cutbush, 4 Burr. 2204; Hoblyn *v.* Rose, in error, 2 Bro. P. C. 329; R. *v.* Cambridge, 2 Selw. N. P. 1144.

(*t*) See Piper *v.* Chappell, 14 Mee. & W. 624; Queen (The) *v.* Powell, 3 Ell. & Bl. 377.

(*u*) R. *v.* Westwood, 7 Bing. 1; S. C. 4 B. & Cress. 781; 4 Bligh. N. S. 213.

(*x*) R. *v.* Ashwell, 12 East, 22.

(*y*) Hence, contrary to the rule as to individuals, a corporation may obtain discovery of documents on the affidavit of their solicitor. See Kingsford *v.* Great Western Railway Company, 16 C. B. (N. S.) 761.

(*z*) Bro. Abr. tit. Feoffment al Uses, 40; Bac. on Uses, 347.

(*a*) 1 Bl. Com. 476. See The Queen *v.* Pocock, 17 Q. B. 34; Stevens *v.* Midland Railway Company, 10 Exch. 352.

Yet it is liable, in certain cases, to an indictment,—as where it allows a bridge, the repair of which belongs to it by law, to fall into decay. And it is capable of suing or being sued for breach of contract, and for many other kinds of civil injury—as, for example a libel (*b*). [But it cannot be summoned into the ecclesiastical courts upon any account; for those courts act only *pro salute animæ* (*c*). Moreover, aggregate corporations that have by their constitution a head,—as a dean, warden, master or the like,—cannot do any acts during the vacancy of the headship, except only the appointing of another: neither are they then capable of receiving a grant; for such corporation is incomplete without its head (*d*). But there may be a corporation aggregate constituted without a head; as, for instance, the collegiate church of Southwell in Nottinghamshire, which consists only of canons (*e*): and the governors of the Charter-house, London; who have no president or superior, but are all of equal authority. 6. Another incident of corporations aggregate is, that the act of the major part is esteemed the act of the whole. By the civil law, the major part must have consisted of two-thirds of the whole; else no act could be performed (*f*): which perhaps may be one reason why they required three at least to make a corporation. But with us, *any* majority is sufficient to determine the act of the whole body (*g*). And whereas, notwithstanding the law

(*b*) Whitfield *v.* The South-Eastern Railway Company, 1 Ell. B. & Ell. 115. See other instances in which a corporation aggregate has been sued for a tort, Yarborough *v.* The Bank of England, 16 East, 2; Green *v.* The London Omnibus Company, 7 C. B. (N. S.) 290.

(*c*) Blackstone adds (vol. i. p. 477), "Neither can it be excommunicated, for it hath no soul, as is gravely observed by Sir E. Coke, 10 Rep. 32."

(*d*) Co. Litt. 263, 264.

(*e*) In Blackstone's time these canons were termed *prebendaries* (1 Bl. Com. p. 478), but see now 3 & 4 Vict. c. 113, s. 1. As to the suspension of canonries or prebends at Southwell, see sects. 18, 36, 41; 4 & 5 Vict. c. 39, s. 12.

(*f*) Ff. 3, 4, 3.

(*g*) Bro. Abr. Corporation, 31, 34. As to the consent of the majority present at a meeting duly convened being sufficient, Cotton *v.* Davies, 1 Str. 53; Oldknow *v.* Wainwright, 2 Burr. 1017.

[stood thus, some founders of corporations had made statutes in derogation of the common law,—making, very frequently the unanimous assent of the society to be necessary to any corporate act, (which King Henry the eighth found to be a great obstruction to his favourite scheme of obtaining a surrender of the lands of ecclesiastical corporations,) it was therefore enacted by stat. 33 Hen. VIII. c. 27, "that all private statutes shall be utterly void, "whereby any grant or election made by the head, with "the concurrence of the major part of the body, is liable "to be obstructed by any one or more being the mino-"rity." But this statute extends not to any negative or necessary voice given, by the founder, to the head of any such society (*h*).] 7. It is also incident to corporations aggregate to have the power of electing their own members and officers, and of thus perpetuating their own succession. When this power is not specially assigned by the charter to a particular portion of the members, it belongs to the major part of the corporation duly assembled for the purpose. It may be delegated, however, by a bye-law,—except in the case of municipal corporations (*i*),—to a select body of the corporators; who then become the representatives, as regards this matter, of the whole community (*k*). But though (to prevent confusion) the number of electors may be thus restrained, on the other hand the number of persons from amongst whom the choice is to be made cannot be diminished by a bye-law (*l*). 8. [It is also incident to corporations aggregate, that they may take *goods and chattels* for the benefit of themselves and

(*h*) It was remarked by Mr. Justice Coleridge, in his edition of Blackstone (vol. i. p. 479), that "every case in which the doubt has "been, whether the statutes, in fact, "give a negative or necessary voice "to the head or any other member "of the corporation, confirms by "implication Blackstone's position" (as above stated), "the accuracy of "which has been questioned. For "no such doubt could have arisen "if the statute of Hen. 8 had taken "away such negative in *all* in-"stances."

(*i*) As to these, vide post, p. 31.

(*k*) Rex *v.* Spencer, 3 Burr. 1827.

(*l*) Ibid. 1833.

[their successors, just as natural persons may for themselves, their executors and administrators; but a sole corporation cannot take goods in his corporate capacity; because such moveable property is liable to be lost or embezzled, and would raise a multitude of disputes between the successor and executor; which the law is careful to avoid (*m*). Yet here a considerable distinction must be made. For if such sole corporation be the representative of a number of persons; as the master of a hospital, who is a corporation for the benefit of the poor brethren (*n*); or the dean of some antient cathedral, who stands in the place of, and represents, in his corporate capacity, the chapter; such sole corporations as these have, in this respect, the same powers as corporations aggregate, and may take personal property or chattels in succession. And, therefore, a bond to such a master, or dean, and his successors, is good in law; and the successor shall have the advantage of it, for the benefit of the aggregate society of which he is in law the representative (*o*). Whereas, in the case of sole corporations, which represent no others but themselves, as bishops, parsons, and the like, no chattel interest can regularly go in succession; and therefore, if a lease for years be made to the Bishop of Oxford and his successors, in such case his executors or administrators, and not his successors, shall have it (*p*).] As to *land* and other real property the law is different: for corporations, whether aggregate or sole, may purchase land and hold the same to them and their

(*m*) Co. Litt. 46; 1 Bl. Com. p. 478. Blackstone states in another place (vol. ii. p. 431), that if such chattel interest were allowed to descend to a *successor*, the property itself would be in *abeyance* from the death of the owner till a successor be appointed; which is contrary to the nature of a chattel interest.

(*n*) Blackstone (vol. ii. ubi sup.) adds, as another example, "an abbot or prior by the old law before the Reformation, who represented the whole convent."

(*o*) Dyer, 48; Byrd *v.* Wilford, Cro. Eliz. 464.

(*p*) Co. Litt. ubi sup.

successors as natural persons may to hold to them and their heirs (*q*); though their power of holding land is subject to the provisions of the statutes of mortmain, of which we have spoken in a former place (*r*); and aggregate corporations are also in general subject to restrictions with regard to the alienation of their lands, a point to which we have also had occasion elsewhere to refer more at large (*s*).

These incidents belong as of course to all bodies corporate; and result from the very act of incorporation, without any express mention being made of them in the charter. But they do not attach to any bodies of persons unincorporated; however connected they may be in point of social position, or however united by express compact. Thus the inhabitants of a particular parish are not capable, without being incorporated, of holding lands to them and their successors; though they are capable of receiving a general grant of incorporation, which would enable them to hold such an inheritance (*t*). And though a voluntary society of individuals should unite together by mutual agreement for common purposes, should provide a com-

(*q*) The Case of Sutton's Hospital, 10 Rep. 30; et vide sup. vol. I. p. 455.

(*r*) Vide sup. vol. I. pp. 454—463.

(*s*) Vide sup. vol. I. pp. 473, 474.

(*t*) Ashby *v.* White, Lord Raym. 931; S. C. 3 Salk. 18; 12 Rep. 121. It is to be observed, however, that there is much property in lands and houses throughout the kingdom which is said, properly, *to belong to the parish*. Such property has generally been given or devised to charitable purposes connected with the poor of that parish; but the instrument of gift or will is often lost, and the trustees not known. In some instances too it happens that the property is given or devised not to any individual trustees, but to the overseers, &c. in trust, though these officers are not competent in law to hold to them and their successors. (See 9th Poor Law Rep. p. 29.) To meet these inconveniences and some other connected with such *parish land* there exist some legislative provisions. See 59 Geo. 3, c. 12, ss. 12, 17, 24, 25 (Ex parte Vaughan, Law Rep., 2 Q. B. 114); 5 & 6 Will. 4, c. 69, s. 5; 5 & 6 Vict. c. 18; 22 Vict. c. 27, s. 4. As to the analogous case of land purchased for the public purposes of a *county*, see 21 & 22 Vict. c. 92, amended by 34 Vict. c. 14.

mon stock by subscription, and should subject themselves to laws of their own creation for the government of their society,—yet all this will not entitle them to the privilege of suing or being sued in their social capacity, or protect them from individual liability (*u*). Indeed, on the other hand, it has been held that for any persons to assume to themselves the character of a corporation, and to attempt to act and to hold themselves out as such without a charter,—is an invasion of the royal prerogative, and in the nature of a criminal offence at the common law (*x*).

It is obvious that some of the incidents above pointed out as belonging to corporations,—particularly that of the members being exempt from personal and individual liability,—operate strongly to the advantage of persons associated in great numbers for common objects, and more especially for objects of a commercial kind. Yet, as the law stood until a recent period, the only method by which these privileges or any of them could be obtained by any association of persons, was that of procuring itself to be formed into a corporation. And this could be done (as we have seen) only by act of parliament or by royal charter (*y*); while on the other hand, when such incorporation was once obtained, these privileges all attached, as of course, and without any exception or restriction, to these persons and their successors for ever. This state of things gave rise, as the spirit of commercial enterprise advanced, to great dissatisfaction among large classes of the community; there being many cases in which the solicitation of associated persons to be formed into a body corporate, with all its attendant privileges, was found to be ineffectual, owing to the caution exercised both by parliament and the advisers of the crown, in reference to this subject;—a caution suggested

(*u*) See Attwood *v.* Small, 7 B. & C. 390; Bramah *v.* Roberts, 3 Bing. N. C. 963; Todd *v.* Emly, 8 Mee. & W. 505; et sup. vol. II. p. 100.

(*x*) See Duvergier *v.* Fellowes, 5 Bing. 248; S. C. in error, 10 B. & C. 826.

(*y*) Vide sup. p. 9.

by the fact, which experience had so fully established, that the enterprises of such associations are sometimes of rash or fraudulent conception, and of ruinous consequence to those who are tempted to become subscribers (*z*). The desire, however, to obviate this dissatisfaction, as far as consistent with the welfare of the public at large, at length induced the legislature to make the experiment of authorizing the crown to create bodies corporate, to which some only of these common-law privileges should attach, or to which they should attach in a partial or modified sense, or which should be for a limited period only, or subject in some other respect to restrictive regulation. Accordingly, by statute 7 Will. IV. & 1 Vict. c. 73, her Majesty was empowered by *letters-patent* to grant to any company or body of persons associated for any trading or other purposes whatever, although not incorporated by such letters-patent, any privileges which, according to the common law, it would be competent to the crown to grant to any such company by charter of incorporation.

In the same spirit, but with still more departure from the principle of the common law, than in the instance of companies partially incorporated under the above statute, have been since passed a variety of Acts for the formation of *Joint-Stock Companies*, which may perhaps be accurately defined as *qualified* corporations, constituted neither by charter, Act of Parliament, or letters-patent, but by the act of the members themselves, and the interest of every member whereof is freely transferable without the consent of the rest (*a*). The latest of these Joint-Stock Companies Acts are the 25 & 26 Vict. c. 89, known as "The Com-

(*z*) By recent provisions, any director, member or public officer of any body corporate or public company, in certain specified cases of fraud, is made guilty of a misdemeanor, and may be punished by imprisonment or penal servitude. See 24 & 25 Vict. c. 96, s. 81. By c. 95, a previous Act on the same subject (20 & 21 Vict. c. 54) is repealed.

(*a*) The appellation of such companies seems to have been derived from the fact, that they usually consist of a great number of persons with a capital, or *joint stock*, proportionably large.

panies Act, 1862," and the 30 & 31 Vict. c. 131, known as "The Companies Act, 1867," in which two statutes most of the existing enactments of the legislature on this subject will be found (*b*). Of these provisions, the first which invites attention is a general one which declares that any *seven* or more persons, associated for any lawful purpose, may, by subscribing their names to a Memorandum of Association (*c*), and otherwise complying with the requisitions of the Acts in respect of registration, form themselves into an incorporated company, with or without limited liability (*d*). And, further, that no company or association, consisting of more than *twenty* persons, shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain to the association, or the individual members thereof, *unless* it is registered under the Acts (*e*).

Upon due registration, the Registrar of Joint Stock Companies—an officer appointed by and under the superintendence of the Board of Trade (*f*), is to certify, under

(*b*) See also 33 & 34 Vict. c. 104 ("The Joint Stock Companies Arrangement Act, 1870"), passed to facilitate compromises and arrangements between the creditors and shareholders of companies in liquidation.

(*c*) 25 & 26 Vict. c. 89, s. 6. The Memorandum of Association *may*, in the case of a company "limited by shares" (as hereafter mentioned), and *shall*, in the case of a company "limited by guarantee," or "unlimited," (as hereafter mentioned,) be accompanied, when registered, by *Articles of Association*, signed by the subscribers to the Memorandum of Association, and prescribing such regulations for the company as they deem expedient. Such articles may adopt all or any of the provisions contained in Table A. in the First Schedule to this Act. (Sect. 14.)

(*d*) Sect. 6.

(*e*) Sect. 4. *Banks*, however, are excepted from this provision and otherwise dealt with as explained hereafter in the chapter on banks (vide post, chap. XIV.) There are also some other excepted cases not requiring registration, though the company or association be established for gain, and consists of more than twenty persons: as, 1. Any company or association formed in pursuance of some other Act or letters-patent; and, 2. Any mining company within and subject to the jurisdiction of the Stannaries. (Ibid.)

(*f*) Sect. 174.

his hand, that the company is incorporated; and in the case of a "limited" company, that it is "limited" (*g*); and thereupon the members become a body corporate by the name contained in the memorandum of association, capable of exercising all the functions of an incorporated company, and having perpetual succession and a common seal (*h*), with power to hold lands (*i*); and also with power to each member to transfer his interest without consent of the rest (*k*); and the certificate of incorporation is made conclusive evidence that the requisitions as to registration have been duly complied with (*l*). The business of the company is managed by Directors, who are appointed by its members (*m*). Though the company is a body corporate, and has therefore a corporate liability, viz. that of its capital or joint stock (*n*), yet the Act

(*g*) As the general rule, the word "limited" must be used by any company registering itself as one with limited liability, in all its proceedings and advertisements, as the last word in its name. An exception, however, is made by 30 & 31 Vict. c. 131, s. 23, in favour of any company formed to promote "commerce, art, science, religion, or any other useful object," and not for individual gain, and licensed by the Board of Trade to be registered with limited liability, without the addition of the word limited to its name.

(*h*) See 27 & 28 Vict. c. 19, as to the seals of joint stock companies carrying on business in *foreign countries*.

(*i*) 25 & 26 Vict. c. 89, s. 18. But no company, formed for the purpose of promoting *art, science, religion, charity*, or any other like object, (not involving the acquisition of gain by the company, or by the individual members thereof,) shall, without the written licence of the Board of Trade, hold more than two acres of land. (Sect. 21.)

(*k*) Sects. 22—24. See also 30 & 31 Vict. c. 131, s. 26. By the 27th and following sections of the last-mentioned Act, the regulations of the company may provide, that such interest on stock, or fully paid-up shares, may pass through the medium of *share warrants*, payable to bearer and transferable by delivery.

(*l*) 25 & 26 Vict. c. 89, ss. 17, 18.

(*m*) Ibid. First Schedule, Table A. (52), &c.

(*n*) By 30 & 31 Vict. c. 131, provisions are made under which any existing limited company may, by special resolution confirmed in Chancery after consideration of the claims of its creditors, *reduce its capital;* and, even without such confirmation, may *divide* its capital into shares of a smaller amount than was fixed by its memorandum

establishes an individual liability also in its members (*o*). And as to such liability, the rule is laid down as follows (*p*),—that, in the event of a company being wound up, every present and past member thereof shall be liable to contribute to the assets of the company to an amount sufficient for payment of its debts and liabilities, and the costs, charges, and expenses of its winding-up, and for the payment of such sums as may be required for the adjustment of the rights of the contributories amongst themselves, but with certain qualifications, and amongst others the following (*q*): 1. That no past member shall be liable if he has ceased to be a member for one year or upwards prior to the commencement of the winding-up (*r*);—2. That no past member shall be liable in respect of any debt or liability of the company contracted after he ceased to be a member;—3. That no past member shall be liable, unless it appears to the court before which the winding-up takes place, that the existing members are unable to satisfy the contributions required to be made by them;—and, 4. That, in the case of a company *limited by shares*, no contributions shall be required from any member exceeding the amount (if any) unpaid on the shares in respect of which he is liable as a present or past member. It results, therefore, that, in the case of a "limited" company (*s*), the members are made liable to

of association (sects. 9—22). See as to this Gen. Ord. 21 March, 1868, In re Sharp, Stewart & Co., Law Rep., 5 Eq. Ca. 155, and Ord. 2 March, 1869, Law Rep., 4 Ch. App. xxxiii.

(*o*) It will be observed, that in this respect, amongst others, the principle of the common law as to a corporation, (vide sup. p. 11,) has been modified in regard to the corporations formed under this Act.

(*p*) 25 & 26 Vict. c. 89, s. 38; and see ss. 7—10.

(*q*) It is also laid down in the Act, that nothing therein contained is to invalidate any provision in any *policy of insurance*, or other contract whereby the liability of individual members therein is restricted, or the funds of the company alone made liable in respect thereof. (25 & 26 Vict. c. 89, s. 38.)

(*r*) As to placing past members on the list of contributories, see Barned's Banking Company, Law Rep., 3 Ch. App. 161.

(*s*) The text refers to the more

the amount (if any) unpaid on the shares respectively held or once held by them, while, in the case of an "unlimited" company, the liability of each member thereof is unlimited. On this rule, however, an important modification has now been engrafted by the Companies Act, 1867, in reference to the liability of the directors as distinct from that of the ordinary members,—it being enacted by 30 & 31 Vict. c. 131, s. 4, that the memorandum of association of a "limited" company may provide that the liability of the directors, managers, or managing director thereof, shall be *unlimited;* in which case each of the directors or managers shall, subject to certain restrictions specified in the Act(*t*), be liable to contribute, in the event of a winding-up, as if he were a member of an unlimited company(*u*). As to the circumstances under which companies, whether "limited" or otherwise, may be compulsorily wound up, it is to be remarked that any person to whom the company is indebted at law or in equity, in a sum exceeding 50*l.*, then due, and who has served on the company, by leaving the same at their registered office, a demand under his hand requiring the company to pay the same, may, if he obtains no satisfaction within three weeks, take proceedings to have the company wound up(*x*); and such course may also be taken by any creditor at law or in equity, if execution or other process issued on a judgment, decree or order obtained in his

ordinary case of a company "limited" *by shares*, but there may also be companies "limited" *by guarantee*, in which case the liability of each member is co-extensive with the amount he has undertaken to contribute in the event of the company being *wound up*, a term hereafter explained. (25 & 26 Vict. c. 89, ss. 9, 38.)

(*t*) These restrictions refer, 1. To the liability of a director who has ceased to hold office; and, 2. To the court being satisfied as to the necessity for the director's additional contribution, in order to discharge the debts and liabilities of the company, and the costs of the winding-up. (30 & 31 Vict. c. 131, s. 5.)

(*u*) By special resolution this provision may be adopted by existing companies. (Sect. 8.)

(*x*) 25 & 26 Vict. c. 89, ss. 79, 80.

favour, is returned by the officer who had to levy under it unsatisfied (*z*).

The winding-up is to take place upon a petition in Chancery presented by the creditor (*a*); but all subsequent proceedings for winding-up may, if thought fit, be directed to be had in the county court having jurisdiction in bankruptcy, in the place where the registered office is situate (*b*). The court which has the winding-up may appoint a person under the name of "*official liquidator*" (*c*), to take into his custody all the property, effects and things in action of the company, and deal with them by sale or otherwise as the court shall sanction, and generally to do all such other things as may be necessary for winding-up the affairs of the company and distributing its assets (*d*). The court is also to proceed to settle a list of *contributories*—or persons liable as members to contribute to the assets of the company (*e*),—and to make *calls* on all or any of the contributories (to the extent of their liability) for payment of the sums necessary to satisfy the debts and liabilities of the company, and the costs, charges and expenses of winding it up, and for the adjustment of the rights of the contributories amongst themselves (*f*); and, as soon as the affairs of the company have been completely wound up, is to make an order that the company be dissolved (*g*). To this general view of the subject of winding-up, however, it must be added that, whenever a company is unable to pay its debts (and in some other cases also), a petition for

(*z*) 25 & 26 Vict. c. 89, ss. 79, 80.

(*a*) Sects. 81, 82. See Gen. Ord. 21 March, 1868, and 2 March, 1869 (Law Rep., 3 & 4 Ch. App.). The winding-up is to be deemed to commence at the time such petition is presented.

(*b*) Sects. 81, 82; 30 & 31 Vict. c. 131, s. 41.

(*c*) 25 & 26 Vict. c. 89, s. 92.

(*d*) Sects. 94, 95.

(*e*) Sects. 38, 74, 98. See In re National Savings Bank Association, Law Rep., 1 Ch. App. 547. As to the position as "contributory" of the holder of fully paid-up shares in a limited company, see In re Anglesea Colliery Company, ibid. p. 555.

(*f*) Sect. 102.

(*g*) Sect. 111.

winding-up may be presented by the company itself, or by a contributory or contributories, as well as by a creditor or creditors, or by all or any of such parties in conjunction (*h*); and, further, that there may also be a *voluntary* winding-up, which is where the company passes a resolution (*i*) for the purpose (*k*),—of which the effect is that a liquidator is appointed by the company itself, who settles a list of contributories, makes calls, and exercises all the powers by the Act given as above stated to the official liquidator (*l*).

III. Returning from this digression as to qualified corporations, we proceed next to inquire how corporations at common law may be *visited*. [For corporations, being composed of individuals subject to human frailties, are liable, as well as private persons, to deviate from the end of their institution. And for that reason the law has provided proper persons to visit, inquire into, and correct all irregularities that arise in them.

With regard to all ecclesiastical corporations, the ordinary is their visitor, so constituted by the canon law, and from thence derived to us (*m*). The pope formerly, and now the crown, as supreme ordinary, is the visitor of the archbishop or metropolitan: the metropolitan has the charge and coercion of all his suffragan bishops: and the

(*h*) 25 & 26 Vict. c. 89, ss. 79—82. By 30 & 31 Vict. c. 131, s. 40, however, the right of a *contributory* to present a winding-up petition is restricted to cases where the members of the company have become less in number than seven; or where he is an original allottee; or has held his shares for a certain period; or where such shares have devolved on him through the death of a former holder.

(*i*) As to the definition of, and regulations concerning, *resolutions* by a company, see 25 & 26 Vict. c. 89, s. 51.

(*k*) Sect. 129. A voluntary winding-up is to be deemed to commence at the time of passing the resolution. (Sect. 130.) A company registered under a former Joint Stock Companies Act may be wound up voluntarily, without re-registration, under the Act of 1862. (See In re London India Rubber Company, Law Rep., 1 Ch. Ap. 329.)

(*l*) Sect. 133.

(*m*) As to what corporations are ecclesiastical, vide sup. p. 5.

[bishops in their several dioceses are in ecclesiastical matters the visitors of all deans and chapters, of all rectors and vicars, and of all other spiritual corporations (*n*).]

With respect to lay corporations of the eleemosynary kind the founder, his heirs, or assigns, are the visitors; for in a lay incorporation the ordinary cannot visit (*o*). And if the sovereign and a private man join in endowing an eleemosynary foundation, the sovereign alone shall be the founder of it; for here the royal prerogative prevails. The founder has also a right to appoint a visitor, and to limit the jurisdiction that he is to possess; and if the heirs of a private founder fail, and no visitor has been appointed by him, the right of visitation devolves in such case upon the crown, and is exercised on behalf of the crown by the Lord Chancellor, sitting as the representative of the sovereign (*p*).

As to a civil lay incorporation (*q*), it has no visitor, in the sense of the term here intended—but the misbehaviour of all bodies corporate of this class are inquired into and redressed, and their controversies decided, in the Queen's Bench, according to the rules of the common law (*r*). [And accordingly in the case of the College of Physicians, though the king by his letters-patent had subjected that body to the visitation of four very respectable persons,—the Lord Chancellor, the two Chief Justices, and the Chief Baron,—though the college had accepted this charter with all possible marks of acquiescence, and had acted under it for more than a century; yet, in 1753 the authority of this provision coming into dispute on

(*n*) See Re Dean of York, 2 Q. B. 1; The Queen *v.* Dean of Rochester, 17 Q. B. 1.

(*o*) 1 Bl. Com. p. 480. As to what lay corporations are eleemosynary, vide sup. p. 7.

(*p*) Rex *v.* Catherine Hall, 4 T. R. 233; Ex parte Wrangham, 2 Ves. jun. 609. It may be noticed, that this part of the jurisdiction of the Lord Chancellor is not transferred to the High Court of Justice, established by the Judicature Act, 1873. (36 & 37 Vict. c. 66, s. 17, sub-sect. 5.)

(*q*) Vide sup. p. 6.

(*r*) Per Holt, Phillips *v.* Bury, Ld. Raym. 8.

[an appeal preferred to these supposed visitors, they directed the legality of their own appointment to be argued: and, as this college was merely a civil and not an eleemosynary foundation, they at length determined, upon several days' solemn debate, that they had no jurisdiction as visitors; and remitted the appellant, (if aggrieved,) to his regular remedy in his majesty's Court of King's Bench (*s*).

With regard to *hospitals*, these were all of them considered, by the popish clergy, as of mere *ecclesiastical* jurisdiction: however, the laws of the land judged otherwise; and with regard to these institutions, it has long been held, that, if the hospital be spiritual, the bishop shall visit—but if lay, the patron (*t*). The right of lay patrons was indeed abridged by statute 2 Hen. V. c. 1, which ordained that the ordinary should visit *all* hospitals founded by subjects; though the king's right was reserved to visit by his commissioners such as were of royal foundation. But the subject's right was in part restored by 14 Eliz. c. 5, which directs the bishops to visit such hospitals only where no visitor is appointed by the founders thereof: and all the hospitals founded by virtue of the statute 39 Eliz. c. 5, are to be visited by such persons as shall be nominated by the respective founders. But still, if the founder appoints nobody, the bishop of the diocese must visit (*u*).

Colleges—but, as before remarked, not the universities of Oxford or Cambridge at large—are also eleemosynary corporations (*x*); though they, also, were certainly considered by the popish clergy, under whose direction they were, as *ecclesiastical*, or, at least, as clerical corporations; and therefore the right of visitation was claimed by the ordinary of the diocese. This is evident, because in many of our most antient colleges, when the founder

(*s*) 1 Bl. Com. p. 482.

(*t*) Year Book, 8 Edw. 3, 28; 8 Ass. 29.

(*u*) 2 Inst. 725.

(*x*) The universities themselves rank as *civil* corporations; vide sup. p. 6.

[had a mind to subject them to a visitor of his own nomination, he obtained for that purpose a papal bull to exempt them from the jurisdiction of the ordinary; several of which are still preserved in the archives of the respective societies. And in some of the colleges of Oxford, where no special visitor is appointed, the Bishop of Lincoln, in whose diocese Oxford was formerly comprised, has immemorially exercised visitorial authority; which can be ascribed to nothing else but his supposed title as ordinary to visit these among other ecclesiastical foundations (*y*).]

But whatever might be formerly the opinion of the clergy, it is now held as established law, that colleges are *lay* corporations, though sometimes totally composed of ecclesiastical persons (*z*); and that, where the founder has appointed no other visitor, and his heirs become extinct, the right of visitation belongs to the crown; and is exercised by the Lord Chancellor as its representative (*a*).

So much with respect to the persons by whom the different classes of corporations are respectively to be visited. With respect to the nature of a visitor's duties it may be laid down generally, that they are to control all irregularities in the institution over which he presides, and to decide and give redress in all controversies arising among the members, as to the interpretation of their laws and statutes (*b*)—that, in the exercise of these duties, he is to be guided by the intentions of the founder, so far as they can be collected from the statutes or from the design of the institution—that, as to the course of proceeding, he is restrained to no particular forms (*c*),—and that, while he keeps within his jurisdiction, his determinations as visitor are final, and examinable in no other court whatso-

(*y*) 1 Bl. Com. 483.
(*z*) Phillips *v.* Bury, Ld. Raym. 8.
(*a*) Vide sup. p. 26, n. (*p*).
(*b*) See Dr. Lee's case, 1 Ell. Bl. & E. 863.
(*c*) See Bishop of Ely *v.* Bentley, 2 Bro. & C. 220; R. *v.* Bishop of Ely, 2 T. R. 290; Re Dean of York, 2 Q. B. 1.

ever (*d*). [Also it is said, that where the founder of an eleemosynary foundation appoints a visitor, and limits his jurisdiction by rules and statutes, if the visitor in his sentence exceeds these rules, an action lies against him; but it is otherwise where he mistakes in a thing within his power (*e*).

IV. We come now, in the last place, to consider how corporations may be dissolved. Any particular member of a corporation may be disfranchised or lose his place therein, by acting contrary to the laws of the society or the laws of the land; or he may resign it by his own voluntary act (*f*). But the body politic may also itself be dissolved in several ways—which dissolution is the civil death of the corporation: and in this case their lands and tenements shall revert to the person, or his heirs, who granted them to the corporation; for the law doth annex a condition to every such grant, that, if the corporation be dissolved, the grantor shall have again the lands, because the cause of the grant faileth (*g*). The grant is indeed only during the life of the corporation, which *may* endure for ever—but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life.] The debts of a corporation aggregate, either to or from it, are totally extinguished by its dissolution (*h*); for it has no longer a corporate character in which to sue or be sued, and as during its existence the members of it could not recover or be charged with the corporate debts in their natural capacities, so neither can they when it has ceased to exist.

(*d*) See Phillips *v.* Bury, Ld. Raym. 5; S. C. 4 Mod. 106; Shaw, 35, 407; Salk. 403; Carth. 180; St. John's College *v.* Toddington, 1 Burr. 200; R. *v.* Bishop of Ely, 2 T. R. 290; R. *v.* Bishop of Worcester, 4 M. & S. 415.

(*e*) 2 Lutw. 1566.

(*f*) 11 Rep. 98; see R. *v.* Liverpool, 2 Burr. 723; R. *v.* Harris, 1 B. & Adol. 936.

(*g*) Co. Litt. 13.

(*h*) Edmunds *v.* Brown, 1 Lev. 237.

A corporation may be dissolved—1. By the loss of such an integral part of its members as is necessary, according to its charter, to the validity of the corporate elections; for in such cases the corporation has lost the power of continuing its own succession, and will accordingly be dissolved by the natural death of all its members (*k*). 2. [By surrender of its franchises into the hands of the sovereign, which is a kind of suicide. 3. By forfeiture of its charter, through negligence or abuse of its franchises; in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void (*l*). And the regular course, in such case, is to bring an information in the nature of a writ of *quo warranto*; to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings. The exertion of this act of law for the purposes of the state, in the reigns of King Charles and King James the second,—particularly by revoking the charter of the city of London,—gave great and just offence; though perhaps, in strictness of law, the proceedings in most of the cases that occurred were sufficiently regular. But the judgment against the charter of London was reversed by act of parliament after the Revolution; and by the same statute it is enacted, that the franchises of the city of London shall never more be forfeited for any cause whatever (*m*).]

(*k*) See 11 Geo. 1, c. 4, s. 5; R. *v.* Pasmore, 3 T. R. 199; R. *v.* Miller, 6 T. R. 268; R. *v.* Morris, 3 East, 813; S. C. 4 East, 17. But by 11 Geo. 1, c. 4, it is provided, that *municipal* corporations shall not be dissolved by the non-election or void election of the mayor or other chief officer on the day mentioned in the charter; and this is held to extend to other officers also. The provisions of this statute are expressly extended to elections under the Municipal Reform Act, by 7 Will. 4 & 1 Vict. c. 78, s. 26.

(*l*) R. *v.* Ponsonby, 1 Ves. jun. 8. See Eastern Archipelago Company *v.* The Queen, 2 Ell. & Bl. 856.

(*m*) Stat. 2 W. & M. sess. 1, c. 8; see R. *v.* Amery, 2 T. R. 515; S. C. in error, 4 T. R. 122.

We have already remarked, that there is a species of lay corporation, which is erected for the good government of a town (*n*). An institution of this kind has, in modern times, been termed a *municipal corporation;* and may be defined generally as a body politic or corporate, established in some town to protect the interests of its inhabitants as such, and the maintenance of order therein; and consisting of the burgesses or freemen, that is, such persons as are duly and legally admitted as members of the corporate body.

The earlier history of the incorporation of our English towns is involved in some degree of obscurity (*o*). What may be stated with certainty, however, is as follows.

First, a diligent examination of our antient historical remains will suffice to establish the point, that even prior to the Norman Conquest there existed, at least, the germ of municipal corporations in this country: it having been usual for such persons of free condition as were not landowners, to settle in the towns and occupy houses there, as tenants to the crown, or some inferior lord, under the name of burgesses; to form themselves, by licence from the crown, (as many classes of persons did in that age,) into voluntary associations or fraternities, called *gilds*, or *guilds* (*p*); to be entitled in their capacity of burgesses to certain property; and, in the same capacity, to be exempt from certain burthens, and to be subject to certain liabilities (*q*). It is also clear, that very soon after the Conquest, and from thence downwards to the time of Henry the sixth, or thereabouts, charters were from time to time conceded by the Anglo-Norman kings to the

(*n*) Vide sup. p. 6.

(*o*) It is suggested in Robertson's Hist. Chas. V. vol. i. p. 33, notes xv.—xviii., that the establishment of communities or corporations in England was posterior to the Conquest, "and that the practice was "borrowed from France." This statement, however, seems to be incorrect. (See Turner's Hist. Anglo-Sax. vol. iii. pp. 106, 107; Domesday Book, passim; Lord Lyttleton's Hist. Hen. II. vol. ii. p. 317.)

(*p*) As to gilds, vide sup. p. 10, n. (*c*).

(*q*) Domesday, passim.

same towns (*r*), and to others, either confirming the former grants, or (as the case might be) conferring new ones; and that by such charters the boroughs were frequently demised in fee farm to the burgesses (*s*). And these persons were also authorized to have a *guild-merchant* (*t*); to have officers, such as mayors, aldermen, bailiffs, and the like, for government of their towns; to hold courts of their own for administration of justice within the same precinct (*u*); and to enjoy many other liberties and privileges, of which it may be said, in general, that they chiefly consisted of exemptions from arbitrary taxation, and from feudal oppressions.

And, lastly, we find that from about the reign of Henry the sixth, to the present day, other charters of a similar character, (though varying of course with the change of times, as to the nature of the specific privileges conferred,) have been repeatedly granted to the same and to other towns by our different monarchs. But in a form more strictly adapted to the legal idea of an incorporation: these instruments containing an express grant that the mayor, bailiff, (or other officers,) and burgesses of the particular towns should be "a body corporate" by a certain name; and by that name should have perpetual succession, and be competent to sue and be sued, and the like (*x*).

Under all these different grants a very large proportion of the different towns of England have successively become incorporated; but until a recent period their con-

(*r*) See the Introduction to Domesday by Sir H. Ellis, vol. i. p. 191.

(*s*) See Madox, Firma Burgi, p. 37.

(*t*) Thus Henry the second grants to the burgesses of Southampton, "*quod habeant et teneant gildam* "*suam et omnes libertates et* "*consuetudines*," &c., and King John grants to Dunwich, "*hansam et gildam mercatoriam.*"—Madox, Firma Burgi, 27, where see other instances.

(*u*) Madox, Firma Burgi, 28, 116, 136, 139.

(*x*) See the charters of Henry the sixth and Edward the fourth, cited in Madox, Firma Burgi, 28.

stitutions were in many respects defective, and of a nature liable to abuse; and being founded besides on charters granted by different kings at different times, (or on the immemorial custom applicable to each particular town where the charter was lost or silent,) were subject to a great and inconvenient variety of structure. To place these important institutions upon a more satisfactory and uniform basis, and to purify their internal economy, it was deemed necessary in the course of the last reign to pass an Act "to regulate the municipal corporations in England and Wales" (*y*).

By this statute, 5 & 6 Will. IV. c. 76, commonly called "The Municipal Corporation Act" (amended by several of later date, and amongst these by 24 & 25 Vict. c. 75, and 32 & 33 Vict. c. 55), the corporate towns, (or, as they are denominated in the statute, *boroughs*,) which are enumerated in schedules annexed thereto,—and which comprise, with the exception of London and certain other places, the whole of the boroughs in England and Wales (*z*)

(*y*) This Act was preceded by the appointment of a commission (dated 18 July, 4 Will. 4), "to "inquire into the existing state of "municipal corporations in England "and Wales, and to collect infor- "mation respecting the defects in "their constitution, &c." The first report of the commissioners, dated 30th March, 1835, contained the following statement: "There prevails "among the inhabitants of a great "majority of the incorporated "towns a general, and, in our "opinion, a just dissatisfaction with "the municipal institutions—a dis- "trust of the self-elected municipal "councils, whose powers are sub- "ject to no popular control, and "whose acts and proceedings being "secret are not checked by the in- "fluence of public opinion—a dis- "trust of the municipal magistracy, "tainting with suspicion the local "administration of justice—a dis- "content under the burthen of local "taxation, while revenues are di- "verted from their legitimate use," &c. (First Report, p. 49.)

(*z*) As to the meaning of the term "borough" in general, vide sup. vol. I. p. 125. And it is to be observed that the Act does not apply to such *parliamentary* boroughs as are not *municipal*. A list of these will be found appended to the first Report of the Commissioners (Table iii. p. 59). And it comprises (among others of less importance) the boroughs of Birmingham, Greenwich, Sheffield, Southwark, Taunton, Westminster, &c. Some of the boroughs, however, in this list (including Birmingham and Sheffield) have since

—are placed under one uniform plan of constitution, thereby newly devised. According to this plan, the definition of a *burgess* or *freeman* (for the terms are convertible), is (*a*) a person of full age, not an alien, nor having received within the preceding twelve months parochial relief or other alms, and who on the last day of July in any year shall have occupied any house, warehouse, counting-house, shop or other building within the borough during the whole of the preceding twelve months; and during such occupation shall have resided within the borough, or within seven miles thereof; and shall, during such time, have been rated in respect of such premises to all rates for relief of the poor, and have paid on or before the 20th July in such year all such poor and borough rates in respect of the same premises, as shall have been payable up to the preceding 5th of January; and shall be duly enrolled in that year as a burgess on the *burgess roll* (*b*). This definition however is to be understood as subject to the following rule, that when the premises came to the party by descent, marriage, marriage settlement, devise, or promotion to any benefice or office,—he shall be entitled to reckon in the occupancy and rating of the former party from whom they were so derived (*c*).

received a charter of incorporation under 5 & 6 Will. 4, c. 76, s. 141, and are therefore now governed under the new plan of constitution. As to the *boundaries* of boroughs (municipal and parliamentary), see 2 & 3 Will. 4, c. 64; 6 & 7 Will. 4, c. 103; 7 Will. 4 & 1 Vict. c. 78, ss. 29, 41; 30 & 31 Vict. c. 102; 31 & 32 Vict. c. 46; 34 & 35 Vict. c. 67.

(*a*) This definition of a burgess is given in 32 & 33 Vict. c. 55, s. 1, by which the preceding enactment (5 & 6 Will. 4, c. 76, s. 9) is repealed. It is to be noticed that by 32 & 33 Vict. c. 55, s. 9, words in the Municipal Acts which import the masculine gender are to be held to include *females*, so far as concerns the right of voting at the election of "councillors," "auditors" and "assessors."

(*b*) As to the burgess roll, see 5 & 6 Will. 4, c. 76, s. 22; 7 Will. 4 & 1 Vict. c. 78; 20 & 21 Vict. c. 50, ss. 6, 7; Hunt *v.* Hibbs, 5 H. & N. 123; Ex parte Hindmarsh, Law Rep., 3 Q. B. 12; The Queen *v.* Tugwell, ib. 704.

(*c*) 5 & 6 Will. 4, c. 76, s. 12; 7 Will. 4 & 1 Vict. c. 78, ss. 8, 9.

The new municipal constitution farther provides, that in every borough there shall be elected(*d*) annually a "mayor" (*e*), — and periodically a certain number of "aldermen" (*f*), and of "councillors" (*g*),—who together shall constitute "the council" (*h*) of the borough (*i*);—that they shall be respectively chosen from among persons on, or entitled to be on, the burgess list, and otherwise qualified as in the Act described (*k*):—that the councillors shall be elected by the burgesses (*l*), and the mayor and

(*d*) With regard to contested municipal elections, it is to be observed that they are now conducted in the manner pointed out in "The Ballot Act, 1872" (35 & 36 Vict. c. 33), of which some account was given in our second volume while explaining the course of *parliamentary* elections (vide sup. vol. II. p. 371). As to corrupt practices at such municipal elections, see 35 & 36 Vict. c. 60, providing for an investigation (where such are stated to have taken place) before barristers appointed for the purpose. It is also to be observed, that with regard to the municipal franchise, and other matters connected with municipal elections, a variety of enactments have been made in addition to the Municipal Corporation Acts mentioned in the text. (See 6 & 7 Will. 4, c. 105, s. 5; 7 Will. 4 & 1 Vict. c. 78, ss. 1, 11, 14, 18, 25, 26; 6 & 7 Vict. c. 89, ss. 1, 2, 3, 5; 15 & 16 Vict. c. 5; 16 & 17 Vict. c. 79, ss. 9—13; 22 Vict. c. 35; 31 & 32 Vict. c. 41.)

(*e*) 5 & 6 Will. 4, c. 76, s. 49. The case of the death, illness, absence or incapacity of the mayor or other municipal officers is provided for by sects. 36, 49; 7 Will. 4 & 1 Vict. c. 78, s. 16; 16 & 17 Vict. c. 79, ss. 7—12. By 6 & 7 Will. 4, c. 105, s. 4, the mayor is to hold over after his year, till acceptance of office by his successor. By 3 & 4 Vict. c. 47, the mayor may be re-elected. By 16 & 17 Vict. c. 79, ss. 7, 8, he may appoint a deputy. By 24 & 25 Vict. c. 75, s. 2, his precedence over the other borough justices is defined and confirmed.

(*f*) 5 & 6 Will. 4, c. 76, s. 25. See 16 & 17 Vict. c. 79, s. 13.

(*g*) 5 & 6 Will. 4, c. 76, ss. 25, 31.

(*h*) As to the powers of the council, see sects. 72, 73; 6 & 7 Will. 4, c. 104, s. 2; 6 & 7 Will. 4, c. 105, s. 8; 7 Will. 4 & 1 Vict. c. 78, ss. 45, 46, 47.

(*i*) 5 & 6 Will. 4, c. 76, s. 25.

(*k*) Sect. 28. See 6 & 7 Will. 4, c. 104, s. 7.

(*l*) 5 & 6 Will. 4, c. 76, ss. 29, 30, 32. (And as to *women* on the burgess roll, see 32 & 33 Vict. c. 55, s. 9.) It is to be observed that certain boroughs of large population are by the Act divided into *wards* (see 5 & 6 Will. 4, c. 76, s. 39; 6 & 7 Will. 4, c. 103, s. 3; Baker *v.* Marsh, 4 El. & Bl. 144), and it is provided that a certain number of councillors shall be as-

aldermen by the council (*m*);—that the council shall meet once a quarter (and oftener if due notice be given), for transaction of the general business of the borough (*n*), and make their decisions according to the majority of the members present (if those present amount to one-third of the whole), and that the mayor, or other member presiding in his absence, shall have a casting-vote (*o*);—that at any meeting at which two-thirds at least of the whole shall attend, the council may make bye-laws for the good rule and government of the borough, for the prevention and suppression of nuisances, and for the imposition of fines on persons in that behalf offending (*p*);—that the burgesses shall also annually elect, from among those qualified to be councillors, two auditors and two assessors (*q*); the former to audit the accounts of the borough, the latter to assist in revising the burgess list (*r*);—and that the council may appoint a town clerk and a treasurer (neither of whom is to be a member of the council), and such other officers as have been usual or shall be necessary, and shall be empowered to fix their salaries (*s*),—and,

signed to each ward, and that the burgesses of each ward and none others shall separately elect the number of councillors assigned thereto. (5 & 6 Will. 4, c. 76, s. 43.) Two assessors are also to be separately elected for each ward. (Ibid.) By 22 Vict. c. 35, provisions are made for the alteration of these wards, in certain cases, and for a re-settlement of their boundaries and fresh apportionment of councillors. (See The Queen *v.* Parkinson, Law Rep., 3 Q. B. 11.)

(*m*) 5 & 6 Will. 4, c. 76, ss. 49, 25.

(*n*) Ibid.

(*o*) Sect. 69.

(*p*) Ibid. As to the proof of the *bye-laws* and other proceedings of municipal corporations, see 36 & 37 Vict. c. 33.

(*q*) 5 & 6 Will. 4, c. 76, ss. 37, 29. *Women*, if otherwise qualified, are now entitled to vote at these elections. (32 & 33 Vict. c. 55, s. 9.)

(*r*) 5 & 6 Will. 4, c. 76, ss. 93, 18. (See Searle *v.* The Queen, 8 Ell. & Bl. 22; The Queen *v.* The Mayor of Rochester, 1 E. Bl. & E. 1024.) By 7 Will. 4 & 1 Vict. c. 78, s. 15, the auditors and assessors are disqualified to be of the council; by sect. 17 an assessor may appoint a deputy.

(*s*) 5 & 6 Will. 4, c. 76, s. 58. As to the *town clerk*, see 20 & 21 Vict. c. 50, s. 5. As to the *treasurer*, see 6 & 7 Vict. c. 89, s. 6.

if the borough have a separate court of quarter sessions, shall also appoint a coroner (*t*) and a clerk of the peace (*u*).

For the council of any borough, which is desirous that a separate court of quarter sessions shall be holden there, may petition the Crown for that purpose (*x*); and if the application be granted, the crown shall appoint a barrister at law to be recorder of the borough (*y*): and such recorder shall be sole judge of such court of quarter sessions: and also of the borough court of record for civil actions, if there be any, provided that it be not regulated by any local act of parliament, and that no barrister of five years' standing sat therein when the Act passed (*z*).

Moreover, to boroughs having a separate court of quarter sessions, as above mentioned, the Crown is empowered to grant a commission of the peace, and to nominate such persons to be justices within the borough as it shall think proper (*a*); and among such justices the

(*t*) 5 & 6 Will. 4, c. 76, s. 62. (See 23 & 24 Vict. c. 116, s. 9.) By 6 & 7 Will. 4, c. 105, s. 6, the coroner may appoint a deputy.

(*u*) 5 & 6 Will. 4, c. 76, s. 103. As to an *assistant* clerk of the peace, see 7 Will. 4 & 1 Vict. c. 19. As to the *removal* of the clerk of the peace, see 27 & 28 Vict. c. 65.

(*x*) 5 & 6 Will. 4, c. 76, s. 103. As to borough quarter sessions, see also 6 & 7 Will. 4, c. 105; 7 Will. 4 & 1 Vict. c. 38; 2 & 3 Vict. c. 27; 5 & 6 Vict. c. 38; 14 & 15 Vict. c. 55, ss. 13, 19; c. 19. As to trial in the county at large, or next adjoining county, of offences committed within the borough, see 38 Geo. 3, c. 52, ss. 2, 3; 51 Geo. 3, c. 100; 60 Geo. 3 & 1 Geo. 4, c. 14; 5 & 6 Will. 4, c. 76, ss. 109—111; 7 Will. 4 & 1 Vict. c. 78, s. 50; 14 & 15 Vict. c. 55, s. 19; c. 100, s. 23; 17 & 18 Vict. c. 35.

(*y*) See 5 & 6 Will. 4, c. 76, ss. 105, 118; by which the recorder has (with certain exceptions) the same authority within the limits of the borough, as the county quarter sessions for the county at large. As to the recorder's power to appoint a *deputy*, see 6 & 7 Vict. c. 89, s. 8: as to his *oath of office*, 6 & 7 Will. 4, c. 105, s. 3.

(*z*) As to borough courts of record, see 6 & 7 Will. 4, c. 105, s. 9; 7 Will. 4 & 1 Vict. c. 78, s. 31; 2 & 3 Vict. c. 27; 15 & 16 Vict. c. 76, s. 228; 17 & 18 Vict. c. 125, s. 105; 23 & 24 Vict. c. 126, s. 44; 35 & 36 Vict. c. 86.

(*a*) 5 & 6 Will. 4, c. 76, s. 98. And as to borough justices, (who are in practice selected by the Lord Chancellor,) see 7 Will. 4 & 1 Vict. c. 78, ss. 30, 31; 12 & 13 Vict. cc. 8, 18, 64; 13 & 14 Vict. c. 91; 15 & 16 Vict. c. 38; 18 & 19 Vict.

mayor (during his year of office), and the recorder, are included in virtue of their office (*b*).

It is provided also, that the council shall not, except by approval of the Lords of the Treasury, sell or mortgage the land or public stock of the borough, or demise them for more than a certain term (*c*): and that the rents, profits, and interest of all corporate property shall be paid to the treasurer, and carried to the account of the *borough fund* (*d*); which, after discharging debts, shall be applied to the payment of salaries, the expenses connected with the corporate elections, prosecutions, constabulary, gaols and maintenance of offenders, and other public purposes (*e*),—that the surplus (if any) shall be expended for

c. 126; 24 & 25 Vict. c. 75, s. 3. As to their *clerk*, see The Queen *v.* Fox, 1 E. & E. 729, and 24 & 25 Vict. c. 75, s. 5. By 5 & 6 Will. 4, c. 76, s. 11, where a borough has *no* separate quarter sessions, the justices for the county are to exercise jurisdiction as justices within the borough, as fully as they do in the county at large. But where a separate court of quarter sessions is granted, then, if the borough were previously exempt from the jurisdiction of the county justices by reason of a *non intromittant* clause in their charter (as to which, see R. *v.* Sainsbury, 4 T. R. 451), it shall still remain so; but otherwise, the county justices will have *concurrent* jurisdiction with the borough justices. (2 Arch. Just. 26.)

(*b*) 5 & 6 Will. 4, c. 76, ss. 57, 103.

(*c*) Sects. 94, et seq.; 6 & 7 Will. 4, c. 104, s. 2; 1 & 2 Vict. c. 31; 17 & 18 Vict. c. 104, s. 546; 22 Vict. c. 27, s. 3; 23 Vict. c. 16. See the law as to this more fully stated, sup. vol. I. pp. 473, 474.

(*d*) As to the borough fund, see 5 & 6 Will. 4, c. 76, s. 92; 6 & 7 Will. 4, c. 104; 23 Vict. c. 16, s. 12. As to property held by corporations on charitable or other trusts, see 5 & 6 Will. 4, c. 76, ss. 71—75; 16 & 17 Vict. c. 137, s. 65. As to discharge of the corporate debt, see 7 Will. 4 & 1 Vict. c. 78, s. 28.

(*e*) 5 & 6 Will. 4, c. 76, s. 92. As to borough prosecutions and maintenance of offenders, see sects. 114, 117; 5 & 6 Vict. c. 98; 13 & 14 Vict. c. 91; 15 & 16 Vict. c. 81, s. 38. As to borough police, 19 & 20 Vict. cc. 69, 118; 22 & 23 Vict. c. 32, ss. 7, 15, 16; 28 & 29 Vict. c. 35. As to local boards of health, 23 Vict. c. 16, s. 12. As to gaols, 12 & 13 Vict. c. 82; 13 & 14 Vict. c. 91; 28 & 29 Vict. c. 126. As to lunatics, 16 & 17 Vict. c. 97; 18 & 19 Vict. c. 105; 19 & 20 Vict. c. 87. As to bridges, 13 & 14 Vict. c. 64. As to burials, 17 & 18 Vict. c. 87, s. 3; 18 & 19 Vict. c. 128. As to roads, 25 & 26 Vict. c. 61, s. 45.

the public benefit of the inhabitants (*f*), and the deficiency (if any) made up by a rate (*g*),—and that the accounts shall be at all times open to inspection, and regularly audited and printed for the use of the ratepayers (*h*); and submitted to the Secretary of State; and laid before both Houses of Parliament (*i*).

Such are the principal features of the new municipal corporation scheme, as to which however it is further to be understood, that it distinguishes between the rights newly conferred by the Act, and the antecedent rights of the corporators, both with regard to the corporate property and as to their parliamentary franchise. For, as to the first, it is provided that every inhabitant, and every person admitted a freeman or burgess, and the wife, widow, son or daughter of any freeman or burgess, and every person married to the daughter or widow of a freeman or burgess, and every apprentice,—shall respectively enjoy the same share and benefit of the lands and public stock of the borough, as he or she might have enjoyed in case the Act had not been passed: subject to the limitation, however, that the total amount to be divided among such persons shall not exceed the surplus which shall remain after payment of the expenses which are charged by the Act upon

(*f*) As to free public libraries and museums in boroughs, see 18 & 19 Vict. c. 70. As to public gardens therein, see 26 & 27 Vict. c. 13. Tulk *v.* Metropolitan Board of Works, Law Rep., 3 Q. B. 94, 682.

(*g*) 5 & 6 Will. 4, c. 76, s. 92. As to borough and watch rate, see 6 & 7 Will. 4, c. 104, s. 5; 7 Will. 4 & 1 Vict. c. 78, s. 29; 7 Will. 4 & 1 Vict. c. 81; 2 & 3 Vict. c. 28; 3 & 4 Vict. c. 28; 8 & 9 Vict. c. 110; 17 & 18 Vict. c. 71; 22 & 23 Vict. c. 32, s. 5. As to rating the corporate property to poor rates, see 4 & 5 Vict. c. 48. As to overseers of the poor and authority of borough justices in matters relating to the poor, 12 & 13 Vict. cc. 8, 64; 15 & 16 Vict. c. 38; 16 & 17 Vict. c. 79, s. 14. As to borough rates in the nature of county rates, 5 & 6 Will. 4, c. 76, s. 92; 17 & 18 Vict. c. 71. As to the collection of borough rate for certain parishes not subject to county rate, 12 & 13 Vict. c. 65, s. 2; 15 & 16 Vict. c. 81, s. 32.

(*h*) 5 & 6 Vict. c. 76, s. 93.

(*i*) 6 & 7 Will. 4, c. 104, s. 10; 7 Will. 4 & 1 Vict. c. 78, ss. 43, 49.

the borough fund (*k*). And, as to the second, it is provided that every person, who would or might have had as a burgess or freeman the right of voting in the election of members of parliament if the Act had not passed, shall be entitled to such right of voting as fully as he might in that case have done (*l*). It is also enacted that the town clerk of every borough shall make out a list (to be called *the freemen's roll*) of all persons admitted burgesses or freemen for the purpose of such reserved rights as aforesaid (*m*),—as distinguished from the burgesses newly created by the Act, and entitled to the rights which it newly confers. These last are to be entered, (as before explained,) on another roll, called the *burgess roll*.

There are some other points of importance, besides those already noticed, on which the Act has innovated upon the laws and customs which formerly prevailed in corporate towns. Before it passed, the title of burgess (or the freedom of the city, as it was called) was generally acquired by birth, marriage or servitude, (that is, by being born of a freeman, by marrying the daughter or widow of a freeman, or by apprenticeship for seven years within the borough to a freeman). It might also be obtained by gift or purchase (*n*). But by the Act it is provided that no person shall in future be made a burgess or freeman by gift or purchase (*o*); the effect of which provision is to leave no other title in force, as regards the right to be placed on the freemen's roll, but those of birth, marriage, and servitude as an apprentice (*p*). It abolishes also (though with a reservation of the rights of the then living claimants) the exemptions that had been ordinarily claimed by burgesses, inhabitants, or the like, from such

(*k*) 5 & 6 Will. 4, c. 76, s. 2.

(*l*) Sect. 4. See 7 Will. 4 & 1 Vict. c. 78, s. 27. As to this right in *parliamentary* boroughs, vide sup. vol. II. p. 360.

(*m*) 5 & 6 Will. 4, c. 76, s. 5. By 1 & 2 Vict. c. 35, no stamp duty is to be paid on any such admission.

(*n*) First Report of Commissioners, pp. 18, 19.

(*o*) 5 & 6 Will. 4, c. 76, s. 3.

(*p*) Sect. 5.

tolls or dues as are levied to the use of the body corporate (*q*). And whereas in divers boroughs a custom had prevailed, and bye-laws had been made, that no person not being free of the borough, or of certain guilds, mysteries, or trading companies therein, should keep a shop for merchandise, or use certain trades or occupations for gain within the same,—the Act provides that every person may in future keep any shop in any borough, and use every lawful trade and occupation therein, any such custom or bye-laws notwithstanding (*r*).

It remains only to observe, that the several provisions of this statute are applicable not only to the boroughs enumerated in the schedules, but to every other (whether before incorporated or not) which shall obtain a new charter of incorporation, on petition to the crown for that purpose (*s*). And that with respect to every borough falling within the Act, all former statutes, charters and usages therein, so far as consistent with the provisions of the new statutes, are to be considered as still in force; while, on the other hand, so much as is not consistent with them is in express terms repealed (*t*).

(*q*) 5 & 6 Will. 4, c. 76, s. 2. See 6 & 7 Will. 4, c. 104, s. 9.

(*r*) 5 & 6 Will. 4, c. 76, s. 14.

(*s*) Sect. 141. As to boroughs incorporated since the Municipal Corporation Act, see also 7 Will. 4 & 1 Vict. c. 78, s. 49; 5 & 6 Vict. c. 111; 11 & 12 Vict. c. 93; 13 & 14 Vict. c. 42; 16 & 17 Vict. c. 79; 18 & 19 Vict. c. 31; 20 & 21 Vict. c. 10.

(*t*) 5 & 6 Will. 4, c. 76, s. 1.

CHAPTER II.

OF THE LAWS RELATING TO THE POOR.

[UNTIL the time of Henry the eighth, the poor subsisted entirely upon private benevolence, and the charity of well-disposed Christians. For though it appears by the Mirrour (*a*), that by the common law the poor were to be "sustained by parsons, rectors of the church, and the "parishioners, so that none of them die for default of "sustenance," yet till the statute 27 Hen. VIII. c. 25, we find no compulsory method chalked out for this purpose; but the poor seem to have been left to such relief as the humanity of their neighbours would afford them. The monasteries were, in particular, their principal resource; and among other bad effects which attended the monastic institutions, it was not perhaps one of the least, (though frequently esteemed quite otherwise,) that they supported and fed a very numerous and very idle poor, whose sustenance depended upon what was daily distributed in alms at the gates of the religious houses. But upon the total dissolution of these, the inconvenience of thus encouraging the poor in habits of indolence and beggary was quickly felt throughout the kingdom: and abundance of statutes were made in the reigns of King Henry the eighth and his children, for providing for the poor and impotent; which, the preambles to some of them recite, had of late years greatly increased.

These poor were principally of two sorts: sick and impotent, and therefore unable to work; idle and sturdy,

(*a*) Chap. 1, sect. 3.

[and therefore able, but not willing to exercise any honest employment. To provide in some measure for both of these in and about the metropolis, Edward the sixth founded three royal hospitals: Christ's and St. Thomas's, for the relief of the impotent, through infancy or sickness; and Bridewell, for the punishment and employment of the vigorous and idle. But these were far from being sufficient for the care of the poor throughout the kingdom at large; and therefore, after many other fruitless experiments, by statute 43 Eliz. c. 2, (which is generally considered as the foundation of the modern poor law,) *overseers* of the poor were appointed in every parish.] And it was provided that the churchwardens of every parish should also be the overseers (*b*); and that there should also be appointed two, three, or four, but not more, of the inhabitants (*c*): such last-mentioned overseers to be substantial householders, and to be nominated yearly by two justices dwelling near the parish (*d*).

(*b*) As to churchwardens and overseers for separate *townships*, see R. *v.* Yorkshire, 6 A. & E. 863, and 7 & 8 Vict. c. 101, ss. 22, 23.

(*c*) By 12 & 13 Vict. c. 103, s. 6, no person shall be appointed overseer who is engaged in any contract for the supply of food for the relief of the poor. By 29 & 30 Vict. c. 113, s. 11, in the case of a small parish, a *single* overseer may be appointed by the justices; and, if need be, he may be an inhabitant householder of an adjoining parish. But as the general rule the appointment of a single person as overseer is *void* (see The Queen *v.* Cousins, 4 B. & Smith, 849). By sects. 10, 12 of the Act just mentioned the same person may hold jointly the offices of churchwarden and overseer, but cannot at the same time be overseer in one parish and assistant overseer in another. The office of overseer is compulsory; but the following classes of persons are exempted from serving:—Peers and members of parliament; justices of the peace; aldermen of London; clergymen; dissenting ministers; practising barristers and attornies; registered medical practitioners; and officers of the courts of law, of the army and navy, and of the customs and excise. (See Archbold's Justice of the Peace in tit. *Poor*, 13; and 21 & 22 Vict. c. 90, s. 34.) On the other hand, the office may be filled by a *woman*. (See R. *v.* Stubbs, 2 T. R. 395.)

(*d*) The appointment is, by 54 Geo. 3, c. 91, to be made on the 25th March, or within fourteen days after. It may be observed here,

This Act of Elizabeth involves two principles; first, that every poor person shall be either relieved, or (what is equivalent) provided with work: next that this shall be done *parochially;* that is, out of funds to be raised and applied by parish officers within the limits of their respective parishes (*e*). It is to be understood, however, that it has not been the policy of the law to allow paupers to resort for relief indiscriminately to any parish they preferred: for, by certain statutes of date anterior to the above Act persons unable or unwilling to work were compellable to remain in the particular parishes where they were *settled* (*f*); that is, where they were born, or had made their abode for three years, or (in case of vagabonds) for one year only (*g*). And this was the origin of the law of *settlement,* with which that of *relief* holds a close connection; these being in fact the two main branches of which the poor-law (as established by 43 Eliz. c. 2) consists. Still there was no regulation either prior to that Act, or for a long period afterwards, to prevent an able-bodied and industrious pauper from resorting to any parish that he pleased for employment. But soon after the Restoration the more restrictive principle was introduced, of confining to his existing place of settlement every

that wherever, by 43 Eliz. c. 2, powers are given in respect of the poor to justices in *counties,* the same powers are by 12 & 13 Vict. c. 8, s. 64, (amended by 15 & 16 Vict. c. 38,) given to justices in *boroughs.*

(*e*) As to extra-parochial places, see 13 & 14 Car. 2, c. 12, s. 22, and the modern enactments of 20 Vict. c. 19; by which last statute all extra-parochial places where no poor rate is levied, and in respect of which there is no agreement for its contribution to the poor rate of any parish, shall now be deemed a parish for all the purposes of assessment to the poor rate, the relief of the poor, the county police or borough rate, the burial of the dead, the removal of nuisances, the registration of parliamentary and municipal voters, and the registration of births and deaths. The above enactments are not *retrospective.* (The Queen *v.* St. Sepulchre, Northampton, 1 E. & E. 813.)

(*f*) 19 Hen. 7, c. 12; 1 Edw. 6, c. 3; 3 & 4 Edw. 6, c. 16; 14 Eliz. c. 5; see also 7 Jac. 1, c. 4, s. 8.

(*g*) 1 Bl. Com. 361.

person whatever whose circumstances were such as to make it probable that he would become a charge upon the public; and new regulations were devised for carrying that principle into full effect. For by stat. 13 & 14 Car. II. c. 12, s. 1, it was (in substance) provided that persons newly coming to settle in any parish, and likely to become chargeable, might be *removed* by the warrant of two justices of the peace, on complaint of the parochial officers, to the parish where they were last legally settled (*h*). But that Act also materially altered the legal idea and definition of settlement; for it abridged the period at which a man becomes settled by residence, to forty days (*i*): and as it subjected the poor to removal from every place in which they were not settled, it had the farther and indirect effect of attaching to the condition of settlement the quality of a *right*, because that condition gave an exemption from removal. This state of the law led to unforeseen consequences. Persons who were desirous (for any reason) of gaining a settlement-right in particular parishes, were soon found to resort to the expedient of intruding into them furtively, with the view of completing their forty days' residence before they should be discovered (*k*). To prevent which, provision was afterwards made, that the forty days should be computed only from the period when notice in writing of the new comer's abode should be given to the parish officers; such notice being dispensed with only in cases where the residence was attended with certain circumstances of notoriety, such as entering into a yearly service, or an apprenticeship (*l*). At a subsequent period, indeed,

(*h*) In R. *v.* St. James, 10 East, 31, Bayley, J., says, "before the "statute of Charles the second, a "settlement was gained by mere "inhabitancy, and the statute was "passed to prevent this."

(*i*) 1 Bl. Com. 362; see Jac. 2, c. 17, s. 3.

(*k*) Bl. Com. ubi sup.

(*l*) Ibid.; and see 3 W. & M. c. 11.

the principle of requiring notice was abandoned altogether (*m*): but the circumstances of notoriety remained, and some of them still remain, (as we shall in the course of this chapter explain more particularly,) indispensable accompaniments of the forty days' residence, so that without them no settlement can be gained. Other consequences in the meantime flowed from the principle that settlement was in the nature of an acquired right: for it became established by a series of judicial decisions, that (like other rights) it might be claimed *derivatively;* that is, that the child was entitled to the parent's settlement, and the wife to that of her husband (*n*); and this addition completes the outline of the settlement law as it still exists,—subject, however, to one important alteration established in the reign of George the third (*o*), viz. that a man coming to settle in a parish is no longer liable to removal upon the mere *probability* of his becoming chargeable; but it is required that he should have actually become chargeable, by receiving or applying for relief; an alteration (it may be observed) which reverts, in some measure, to the principle of the system as it stood anterior to the statute of Charles the second.

The law as to *relief* was stationary to a much later period, though it has latterly undergone fundamental alterations of the greatest importance. Not only the collection of the rate, but the relief of the poor, with all its attendant management, was long left (conformably to the institution of the statute of Elizabeth) to the overseers of the respective parishes. But these officers were found unequal to the proper discharge of the latter duty. In modern times at least, when, by the gradual increase

(*m*) 35 Geo. 3, c. 101, s. 3.

(*n*) Fort. 313; 1 Nol. 274.

(*o*) Sect. 1. As to the effect of a *certificate* of settlement as conferring the status of irremovability, except in the event of becoming actually chargeable, see the prior statutes 8 & 9 Will. 3, c. 30; 9 & 10 Will. 3, c. 11; 12 Ann. c. 18, s. 2; 3 Geo. 2, c. 29, ss. 8, 9.

of population and of paupers, its services had become more onerous, they were rarely performed to the satisfaction of the public; and various measures were from time to time devised by the legislature, for improvement of the practical system. Thus by the statute 22 Geo. III. c. 83,—commonly called Gilbert's Act (*p*),—any parish was authorized, (by consent of two-third parts in number and value of the owners or occupiers, and with the approbation of two justices,) to appoint *guardians* to act in lieu of overseers, in all matters relative to the relief and management of the poor; and also to enter into a voluntary union with one or more other parishes for the more convenient accommodation, maintenance and employment of their paupers in common. This was followed by the 59 Geo. III. c. 12, called "The Select Vestry Act,"—by which any parish, in vestry assembled, was enabled to commit the management of its poor to a committee of the parishioners called a *select vestry;* to whose orders the overseers should conform (*q*).

But these new methods, though found to be beneficial, were upon the whole not attended by results sufficiently effective. Their introduction, too, being left to the option of the parishioners, the conflict of opinions which generally attends all subjects of political economy, or the dislike of change, or some inactivity in the public mind, prevented their general adoption.

In the meantime the evils resulting from the mismanagement of the poor continued to increase.

The negligent and injudicious administration of the parochial funds, in various parts of the kingdom, had the effect of withdrawing a portion of their due provision from the necessitous and impotent poor, and wasting it on those who were able, but unwilling to work: and this

(*p*) See Henderson *v.* Sherborne, 2 M. & W. 239; R. *v.* Poor Law Commissioners, in re Whitechapel Union, 6 Ad. & E. 49.

(*q*) As to *vestries*, vide sup. vol. I. pp. 120—122.

led to idleness, improvidence and vice among the lower classes of society: and, consequently, to an increase in pauperism and in the amount payable for poor rates.

The case was aggravated by some inherent defects in the principle of the then existing system, which tended strongly to prevent any practical improvement.

For the duty of executing the poor law being left to the several parishes, which stood in no subordination, and owed no deference, to any external authority, reforms suggested from without seldom met with much attention, and little benefit was derived from any example of superior management exhibited in other parts of the kingdom. The size of most parishes, also, was so limited, as to expose them to great disadvantages, both with regard to the employment and the maintenance of their poor; the difficulty and expense of which are both obviously reduced, when the field of operation is wider, and provision can be made on a larger scale. It was on these and similar considerations that parliament, in the year 1833, urged the issue of a royal commission to inquire into and report on the laws relating to the poor. And from the recommendations of the commissioners, after they had thoroughly investigated the subject, emanated the important statute 4 & 5 Will. IV. c. 76, known as "The Poor Law Amendment Act, 1834" (*r*).

(*r*) There are a great variety of statutes in amendment of, or connected with, the system introduced by the Poor Law Amendment Act, 1834. These comprise the following:—5 & 6 Will. 4, c. 69 (The Union and Parish Property Act, 1835); 2 & 3 Vict. c. 84; 5 & 6 Vict. c. 18 (Parish Property and Parish Debts Act, 1842); 5 & 6 Vict. c. 57 (Amendment Act, 1842); 7 & 8 Vict. c. 101 (Amendment Act, 1844); 8 & 9 Vict. c. 117; 9 & 10 Vict. c. 66 (Poor Removal Act, 1846); 10 & 11 Vict. c. 109 (Poor Law Board Act, 1847); 11 & 12 Vict. c. 81 (Poor Law Procedure Act, 1848); c. 82; c. 91 (Audit Act, 1848); c. 110 (Amendment Act, 1848); c. 111; 12 & 13 Vict. c. 13; c. 103 (Amendment Act, 1849); 13 & 14 Vict. c. 101 (Amendment Act, 1850); 14 & 15 Vict. c. 105 (Amendment Act, 1851); 20 Vict. c. 19; 22 & 23 Vict. c. 49; 24 & 25 Vict. c. 55;

By this statute the general management of the poor and of the funds for their relief throughout the country, was placed for a limited period under the superintendence and control of "The Poor Law Commissioners;" who had power to make such regulations as they thought proper for guidance of the different parochial authorities, and who were aided in their operations by a certain number of assistant commissioners. This commission was superseded in the year 1847; and in lieu thereof a board was established by 10 & 11 Vict. c. 109, known as the "Poor Law Board," and to which all the powers and duties of the former poor law commissioners were transferred (*s*). But these powers and duties have now been assigned to and vested in the "Local Government Board," (established in the year 1871 by the 34 & 35 Vict. c. 70,) which consists of a president appointed by her Majesty, holding office during pleasure, together with the lord president of the council, all the secretaries of state, the lord privy seal, and the chancellor of the exchequer, as *ex officio* members. All *general poor law rules*—a term which extends to all rules directed to affect more than one union (*t*)—must be under the seal of this Board and under the hands of a quorum, of whom the president must be one (*u*); and any such rule may be dis-

c. 76; 25 & 26 Vict. c. 113; 26 & 27 Vict. c. 89; 28 & 29 Vict. c. 79 (The Union Chargeability Act, 1865); 29 & 30 Vict. c. 113 (Amendment Act, 1866); 30 & 31 Vict. c. 6 (The Metropolitan Poor Act, 1867, amended by 34 Vict. c. 15); c. 106 (Amendment Act, 1867); 31 & 32 Vict. c. 122 (Amendment Act, 1868); 32 & 33 Vict. c. 45 (The Union Loans Act); c. 63 (The Metropolitan Poor Amendment Act, 1869); 33 Vict. c. 2 (The Dissolved Boards of Management and Guardians Act, 1870); 33 Vict. c. 18 (The Metropolitan Poor Amendment Act, 1870); 33 & 34 Vict. c. 48 (The Paupers Conveyance Expenses Act, 1870); 34 Vict. c. 11 (The Poor Law Loans Act, 1871); 34 & 35 Vict. c. 108 (The Pauper Inmates Discharge and Regulation Act, 1871); 35 Vict. c. 2 (The Poor Law Loans Act, 1872).

(*s*) 10 & 11 Vict. c. 109, s. 10. And see 30 & 31 Vict. c. 106.

(*t*) Ibid. s. 15.

(*u*) Only the *president* and two *secretaries* of the Local Government Board receive remuneration

allowed by her Majesty in council (*x*). And the Board is, moreover, directed, once in every year, to submit to both houses of parliament a general report of its proceedings (*y*). It is empowered to direct (where such course seems proper) that the relief of the poor in any parish shall be administered by a board of guardians; to be elected by the owners of property and ratepayers in such parish, in such manner as in the Poor Law Acts set forth (*z*). A certain number of Inspectors are also appointed for the purpose of exercising a visitorial power over workhouses (*a*), and of being present at meetings of guardians, or other local meetings held for the relief of the poor (*b*). Moreover, not only are no parishes for the future to be united under Gilbert's Act without the previous consent of the Board, but such Board is also entrusted with the important power of consolidating at its own discretion,—so far as the relief and management of the poor is concerned,—any two or more parishes into one *union*, under the government of a single board of guardians, to be elected by the owners and ratepayers of the component parishes (*c*). And each of such "unions" is to have a

for their services. The president and *one* of the secretaries (only) may sit in the House of Commons at the same time. (10 & 11 Vict. c. 109, ss. 8, 9; 34 & 35 Vict. c. 70, s. 4.)

(*x*) 10 & 11 Vict. c. 109, s. 17. As to the removal of Poor Law orders, into the Queen's Bench, see 11 & 12 Vict. c. 110, s. 4; 12 & 13 Vict. c. 103, s. 13; Westbury-on-Severn Union case, 4 Ell. & Bl. 314.

(*y*) 10 & 11 Vict. c. 109, s. 13.

(*z*) 4 & 5 Will. 4, c. 76, ss. 39, 40 (see Robinson *v.* Todmorden Union, 3 Q. B. 675). As to the election of the guardians and the qualification of the voters, see also 7 & 8 Vict. c. 101, ss. 14—21; 14 & 15 Vict. c. 105, ss. 2, 3; 30 & 31 Vict. c. 106, ss. 4—10.

(*a*) By 12 & 13 Vict. c. 13, the superintendence of the board is extended to the case of poor persons lodged and maintained by contract, in any establishment not being a lunatic asylum or workhouse, nor under the effective control of any parochial or other local authorities.

(*b*) 10 & 11 Vict. c. 109, ss. 18, 20.

(*c*) 4 & 5 Will. 4, c. 76, s. 38. By 7 & 8 Vict. c. 101, s. 24, county justices residing in a union or parish are to be guardians *ex officio*. By 12 & 13 Vict. c. 103, s. 19, the chairman at any meeting of the board of guardians is to have a casting-vote. By the Marriage and Registration Acts (6 & 7 Will. 4, cc. 85, 86, and 7 Will. 4 & 1 Vict. c. 22), the Me-

common workhouse provided and maintained at their common expense; and also a *common fund* to which each of the parishes of which it consists shall contribute (*d*): and on this fund is now, by a recent alteration of the law (viz., by 28 & 29 Vict. c. 79, s. 1), charged all the cost of the relief of the union poor as well as certain other expenses incurred by the board of guardians (*e*).

This short historical review of the principles on which the poor law is founded seemed a proper preliminary to the consideration of the practical system now existing, which may be compendiously explained as follows.

tropolitan Police Act (2 & 3 Vict. c. 71, s. 41), the Act for protection of apprentices and servants (14 & 15 Vict. c. 11), and the County Rate Act (15 & 16 Vict. c. 81),—the guardians of the poor are now entrusted with various other duties in addition to those more immediately connected with the administration of the poor law.

(*d*) As to the mode of calculating the contribution of the several parishes to the common fund of the union to which they belong, see 24 & 25 Vict. c. 55, ss. 9—11; 28 & 29 Vict. c. 79, s. 12; 30 & 31 Vict. c. 106, s. 15.

(*e*) Prior to this enactment each parish of a union under the Poor Law Acts was chargeable separately with the expenses of its own poor, as provided by 4 & 5 Will. 4, c. 76, ss. 25, 26. The other expenses charged on the common fund of the union comprise those incurred in the relief "of any destitute wayfarer or wanderer, or foundling" (11 & 12 Vict. c. 110, ss. 1, 10; 12 & 13 Vict. c. 103, s. 2; 24 & 25 Vict. c. 55, s. 4); in the burial of the workhouse paupers (13 & 14 Vict. c. 6; 28 & 29 Vict. c. 79, s. 1); and in the relief of persons temporarily disabled by accident or sickness (24 & 25 Vict. c. 16, s. 5); and also the expenses incurred in regard to pauper lunatics (ib. s. 6); and for vaccination and registration (28 & 29 Vict. c. 79, s. 1). It is to be observed, with regard to the relief of the destitute poor *in the metropolis*, that the cost of their relief is now distributed among the several unions, parishes and places therein, under the assessment of the Local Government Board (30 & 31 Vict. c. 6; 34 & 35 Vict. c. 70). It may be also worth notice, that on an occasion of great distress in the counties of Lancaster, Chester and Derby, the Poor Law authorities were enabled, by a temporary Act (25 & 26 Vict. c. 110), to call, in certain cases, on the unions of the county at large, to contribute to the relief required in particular unions or parishes situated in such county.

According to the present law, a settlement is acquired by the following methods. 1. By *birth*. For wherever a child is first known to be, that is always *primâ facie*, and until some other can be shown, the place of its settlement (*f*). But if its parents can be proved to have acquired a settlement, either by birth or otherwise, in another parish, then the *primâ facie* settlement of the child will be superseded by a derivative one, viz. the settlement by parentage, of which we are about to speak next (*g*). 2. By *parentage*. For all legitimate children take the last settlement of the father, and, after his death, of the mother; till they are emancipated from parental authority by marriage, or by attaining the age of twenty-one and living permanently separate from the parent, or by contracting some relation inconsistent with domestic subjection (*h*): and when emancipated, they retain the parental settlement last acquired before that event took place. A bastard child, on the other hand (having in the eye of the law no parent) was at one time held incompetent to claim a derivative settlement. By a provision, however, in the Poor Law Amendment Act, an illegitimate child born since that statute passed, is now to follow the settlement of his mother; until he attains the age of sixteen, or gains another for himself (*i*). But besides those of birth or parentage, there are also settlements acquired by the party's own act. For a female gains a derivative settlement: 3. By *marriage*, i. e. she may claim the settlement which belongs to her husband; and she

(*f*) As to the proof of settlement by birth, see the Queen *v.* Crediton, 1 Ell. Bl. & E. 231.

(*g*) See R. *v.* St. Mary, Leicester, 3 Ad. & Ell. 644; *v.* Walthamstow, 6 Ad. & El. 301.

(*h*) See R. *v.* Witton cum Twanbrookes, 3 T. R. 355; *v.* Sowerby, 2 East, 276; *v.* Everton, 1 East, 526; *v.* Lilleshall, 7 Q. B. 159; *v.* Scammonden, 8 Q. B. 349; *v.* Inhabitants of Selborne, 2 Ell. & Ell. 275.

(*i*) 4 & 5 Will. 4, c. 76, s. 71. See R. *v.* Walthamstow, ubi sup.; *v.* Wendron, 7 A. & E. 819; *v.* St. Mary, Newington, 4 Q. B. 581; *v.* Sutton Le Brailes, 5 Ell. & Bl. 814; *v.* Combs, ibid. 892.

retains that settlement after his death. If her husband has no settlement (being born abroad and having acquired none), or if his settlement is unknown, then she retains that which belonged to her before marriage. But she cannot, in any case, acquire one in her own right during the marriage. A settlement may also be acquired, 4. By *renting a tenement*, coupled with residence in the same parish for forty days (*k*). For this purpose, however, it is requisite that the person should have *bonâ fide* rented a tenement, consisting of a separate or distinct dwelling-house or building, or of land (or of both), for the sum of 10*l.* a-year at the least for the term of one whole year; and that he should have occupied the same under such hiring, and actually paid the rent to the amount of 10*l.* for the term of one whole year at the least; and that for the same period, he should have been assessed to and paid the poor rate in respect thereof (*l*). 5. A settlement may also be gained by being *bound apprentice* (*m*), under indenture or other deed, and *inhabiting* for forty days under such binding; either in the same parish where the service takes place, or a different one. But no settlement can be acquired by being apprenticed in the sea service, or to a householder exercising the trade of the seas, as a fisherman or otherwise (*n*); and the indenture must in all cases be

(*k*) See R. *v.* Snape, 6 A. & E. 278; *v.* Berkswell, ibid. 282; *v.* Henley-upon-Thames, ibid. 294; *v.* Hockworthy, 7 A. & E. 492; Overseers of Willesden *v.* Paddington, 3 Best & Smith, 593; The Queen *v.* Exeter, Law Rep., 4 Q. B. 341.

(*l*) 6 Geo. 4, c. 57, s. 2; 1 Will. 4, c. 18, s. 1; 4 & 5 Will. 4, c. 76, s. 66. See R. *v.* Hertsmonceaux, 7 Barn. & Cress. 541; *v.* Stow, 4 Barn. & Cress. 87; *v.* Kibworth Harcourt, 7 Barn. & Cress. 790; *v.* Usworth, 5 Ad. & E. 261; *v.* Benjeworth, 3 Ell. & Bl. 637; *v.* Halifax, 4 Ell. & Bl. 647.

(*m*) As to what constitutes hiring as apprentice, see R. *v.* Billinghay, 5 A. & E. 676. As to service by apprenticeship generally, see R. *v.* Sandhurst, 6 A. & E. 130; *v.* Closworth, ibid. 286; *v.* Exminster, ibid. 598; *v.* Barmston, 7 A. & E. 858; *v.* Fordingbridge, 1 Ell. Bl. & Ell. 678; *v.* Barton-upon-Irwell, 3 Best & Smith, 604; St. Pancras *v.* Clapham, 2 Ell. & Ell. 742.

(*n*) 4 & 5 Will. 4, c. 76, s. 67; see R. *v.* Maidstone, 5 A. & E. 326.

executed by the apprentice, except in the case of one bound by the parish (*o*). 6. A settlement is gained, of a temporary kind, in any parish, by having *an estate of one's own* there, of whatever value, and whether the interest be legal or equitable (*p*); a particular species of settlement founded on the principle of the common law, that a man shall not be removed from his own property (*q*). It has, however, been provided by statute, that no person shall retain a settlement gained by virtue of any estate or interest in a parish, for any longer time than he shall inhabit within ten miles thereof (*r*): and that in case he shall cease to inhabit within that distance, and shall afterwards become chargeable, he shall be liable to be removed to the parish in which he was settled previously to such inhabitancy; or if he have gained a settlement in some other parish since the inhabitancy, then to such other parish (*s*). 7. Lastly, a settlement may be gained by being *charged to and paying the public taxes, and levies of the parish* (*t*),—those for scavengers and highways and the duties on houses being however excepted. But it is provided by the 35 Geo. III. c. 101, s. 4, that no person shall gain a settlement on this ground in respect of any tenement or tenements not being of the yearly value of 10*l.*; and by 6 Geo. IV. c. 57,

(*o*) As to the binding of poor children as apprentices, see also 4 & 5 Will. 4, c. 76, s. 15; 7 & 8 Vict. c. 101, s. 12; R. *v.* Arnesby, 3 Barn. & Ald. 584; *v.* St. Mary Magdalen, 2 Ell. & Bl. 809.

(*p*) As to settlement by estate, R. *v.* Ardleigh, 7 A. & E. 70; *v.* Belford, 10 B. & C. 54; *v.* Knaresborough, 16 Q. B. 446; Wendron *v.* Stythians, 4 Ell. & Bl. 147; The Queen *v.* Belford, 3 B. & Smith, 662; *v.* Thornton, 2 Ell. & Ell. 788.

(*q*) 2 Nolan, 58.

(*r*) As to the mode of calculating this distance, see Queen *v.* Saffron Walden, 9 Q. B. 76.

(*s*) 4 & 5 Will. 4, c. 76, s. 68; see R. *v.* Hendon, 2 Q. B. 455.

(*t*) 3 W. & M. c. 11, s. 6. See also 6 Geo. 4, c. 37, s. 2; 1 & 2 Will. 4, c. 42, s. 5; and the following cases: R. *v.* Stoke Damerel, 6 A. & E. 308; *v.* St. Giles, 7 Ell. & Bl. 205; *v.* Westbury-on-Trym, ibid. 444; *v.* St. Anne's Westminster, 2 Ell. & Ell. 485; Everton *v.* South Stoneham, ib. 771; St. George's Hanover Square *v.* Cambridge Union, Law Rep., 3 Q. B. 1; The Queen *v.* St. Thomas, ib., 5 Q. B. 371.

that no settlement shall be acquired by paying parochial rates for any tenement (not being the person's own property), unless it consists of a separate and distinct dwelling-house or building, or land (or both), *bonâ fide* rented by him for 10*l.* a year at the least for a whole year, and be occupied under such hiring for a year at least. This title to a settlement is therefore nearly merged in that of renting a tenement (*u*).

Such are the modes in which a settlement may now be acquired, and in which it has been capable of being acquired, since the 14th August, 1834, the date of the passing of the Poor Law Amendment Act of that year; by which statute some material alterations were made in this branch of the law. As questions, however, may still arise with respect to settlements gained immediately before those alterations, it may be desirable to observe, that before the 14th August, 1834, they could be acquired by forty days' residence, accompanied with other circumstances of notoriety, in addition to those which have been above enumerated, viz., 1. By hiring and service; which was where a person, being unmarried and childless, was hired for a year, and served a year in the same service. 2. By executing any public annual office or charge within the parish for one whole year. We may also notice that the settlement by renting a tenement was at that period capable of being acquired without payment of the poor rate, or being assessed to the same.

On this part of our subject we shall only add, that when by any of the modes above enumerated a person has gained a settlement in any parish, he is considered as settled there until he acquires a new one in some other place; but the later acquisition supersedes the earlier.

All those who stand in need of relief, and apply for it, are entitled to be relieved in the parish (or union) in

(*u*) See Arch. P. L. Act, Introduction, p. 3; St. George's Hanover Square *v.* Cambridge Union, Law Rep., 3 Q. B. 1.

which they happen to be, or to which, as it is commonly expressed, they are *chargeable* (*x*). If settled there, they constitute its *settled* poor. If not settled there, they are termed its *casual* poor (*y*).

The guardians, however, will be immediately exonerated from the burthen, if they can impose the duty of maintenance on any one competent and by law compellable to afford relief. Those who are so compellable are the wife and husband, the father and grandfather, mother and grandmother, or children of the pauper (*z*). They are liable to maintain him at such rate as shall be assessed by an order of the justices at their general, quarter or petty sessions (*a*): and on refusal to obey such order, the sums so assessed are recoverable (with penalties) by a summary proceeding before two justices of the peace, and may be levied by distress and sale of the goods and chattels of the offender; in default of which he may be committed to prison (*b*). To secure the performance of this duty it is moreover provided by 5 Geo. I. c. 8, that where any person shall run away from his place of abode, leaving his wife or children chargeable as paupers,—his goods, or any annual profits of his lands, may be seized under the warrant or order of two justices, and (if such warrant or order be confirmed by the sessions) may be applied

(*x*) As to the *cost* of such relief, vide sup. p. 51.

(*y*) See 33 Geo. 3, c. 35, s. 3; R. v. St. Pancras, 7 A. & E. 750; and see 7 & 8 Vict. c. 101, s. 26, as to the relief of wives whose husbands are beyond sea or confined as lunatic or idiot; and the relief (in certain cases) of widows.

(*z*) 43 Eliz. c. 2, s. 7. As to relief to a married woman, see 31 & 32 Vict. c. 122, s. 33; Thomas, app., Alsop, resp., Law Rep., 5 Q. B. 151. As to the case of a *husband* becoming chargeable whose wife has separate property, see 33 & 34 Vict. c. 93, s. 13.

(*a*) 59 Geo. 3, c. 12, s. 26.

(*b*) 4 & 5 Will. 4, c. 76, ss. 78, 99; 11 & 12 Vict. c. 110, s. 8. By sections 56 and 57 of the former statute, relief given to a child under sixteen (not blind or deaf and dumb) shall be considered as given to the parent; and every person is to maintain his wife's children (if any) born before his marriage with her, until they reach the age of sixteen, or until the death of the mother.

towards the maintenance of such wife or children. It is also enacted by 5 Geo. IV. c. 83, that all persons wholly or in part able to maintain themselves or families by work or other means, but refusing or neglecting so to do, whereby they become chargeable as paupers, shall be deemed *idle and disorderly persons;* and may be summarily convicted and imprisoned in the house of correction with hard labour, for any time not exceeding one calendar month. And, by the same statute, the *desertion* of a family is still more severely penal; for persons running away and leaving their wives or children chargeable, are to be deemed *rogues and vagabonds;* and incur the liability to the like imprisonment for any time not exceeding three calendar months (*c*).

If there are no relations to whom recourse can be had, the settled poor are then to be relieved by the local authorities, so long as their necessity continues; but if paupers who are able to work refuse to do so, they may be committed to the common gaol or house of correction (*d*).

With respect to the casual poor, they may in general be *removed* in the manner to be presently described; and they are entitled to relief only till such removal can be effected (*e*). All such as were born in Scotland or Ireland, the Isle of Man, Scilly, Jersey or Guernsey, and are not settled in England,—may, upon complaint of any guardian, relieving officer or overseer, be removed to the place of their birth (*f*), with their families,—that is, with their

(*c*) As to offences and arrests under this Act, see Reeve *v.* Yeates, 1 H. & C. 435; Horley *v.* Rogers, 2 Ell. & Ell. 674. As to expense of prosecution of offences thereunder, see 7 & 8 Vict. c. 101, s. 69. By 12 & 13 Vict. c. 103, s. 3, the chargeability to the common fund of a union shall have the same effect, so far as regards such offences, as chargeability to a parish.

(*d*) 43 Eliz. c. 2, s. 4; 55 Geo. 3, c. 137; 7 & 8 Vict. c. 101, ss. 57, 58.

(*e*) By 34 & 35 Vict. c. 108, provisions are made with regard to the treatment and discipline of the casual poor, while in the wards and workhouses provided for them; and regulating the manner of their discharge.

(*f*) The expenses of removal in the case of a parish not forming part of a union, and not containing

wives and children, or such of them as are chargeable and have yet acquired no settlement in their own right (*g*),—by the order and warrant of two justices of the peace (*h*). Those who have a known place of settlement in England (wherever born) may also be removed to it, with their families, under a similar authority (*i*). The removal order is obtained, upon complaint of the parish (or union) to which the paupers have become chargeable (*k*); and notice thereof in writing, accompanied by a statement in writing of the ground of the removal, must be sent to the parish (or union) on which it is made (*l*). If the order is submitted to, or if no notice of appeal is given within twenty-one days, the pauper is to be removed accordingly; but if such notice is given within that period, he shall be kept where he has become chargeable until the appeal (if duly prosecuted) shall have been determined (*m*). The

more than 30,000 persons, are payable out of the county rate, 8 & 9 Vict. c. 117, s. 5.

(*g*) See Much Hoole *v.* Preston, 17 Q. B. 548; The Queen *v.* St. Giles without Cripplegate, ib. 636; *v.* St. Anne, Blackfriars, 2 Ell. & Bl. 440.

(*h*) 17 Geo. 2, c. 5; 59 Geo. 3, c. 12; 5 Geo. 4, c. 83; 8 & 9 Vict. c. 117, s. 4. See also 24 & 25 Vict. c. 76; 25 & 26 Vict. c. 113, and 26 & 27 Vict. c. 89, by which a removal order to *Scotland* or *Ireland* is required to be made either at petty sessions, or by a stipendiary or metropolitan police magistrate sitting in court.

(*i*) As to the procedure in respect of orders of removal, see 11 & 12 Vict. c. 31; 24 & 25 Vict. c. 76. As to the delivery of the pauper thereunder, 9 & 10 Vict. c. 66, s. 7; 14 & 15 Vict. c. 105, s. 13. As to the offence of unlawfully procuring a removal, see 9 & 10 Vict. c. 66, s. 6; 12 & 13 Vict. c. 103, s. 3. As to the expenses incurred in the conveyance of the pauper removed, see 33 & 34 Vict. c. 48.

(*k*) 13 & 14 Car. 2, c. 12, s. 1. If the parish form part of a *union* under the Poor Law Amendment Acts, the order of removal and subsequent proceedings may be had by or against the guardians thereof (28 & 29 Vict. c. 79, s. 2). By 7 & 8 Vict. c. 101, s. 69, and 11 & 12 Vict. c. 110, s. 11, the certificate of the guardians shall be sufficient evidence of the chargeability of a pauper.

(*l*) 4 & 5 Will. 4, c. 76, s. 79; 11 & 12 Vict. c. 31, ss. 2, 3, 4. See Reg. *v.* Yorkshire, 1 Ell. Bl. & Ell. 713; *v.* Ruyton, 1 Best & Smith, 534.

(*m*) 4 & 5 Will. 4, c. 76, ss. 79, 80, 81, 83; R. *v.* Kent, 6 B. & C. 639; *v.* Leominster, 2 B. & Smith, 391.

appeal is to the quarter sessions having jurisdiction for the place from which the removal is directed (*n*). If that court think fit, it may order the parish (or union) against which the appeal shall be decided to pay reasonable costs to the other (*o*); and where the respondents succeed such costs will include the relief and maintenance of the pauper, from the time of the notice of the order of removal (*p*). In the event of some doubtful point of law arising, the justices have the power of making their order in the appeal subject to a *special case*; that is, to connect it with a statement of the facts proved before them, so that the event may follow the opinion of the Queen's Bench upon the point of law (*q*). When this course is taken, or when the party decided against is dissatisfied with the order made at sessions, a writ of *certiorari* issues from the Queen's Bench to remove the proceedings to its own jurisdiction, and the case is then there argued, and the order of sessions either affirmed or quashed, according to the law as it appears on the facts given in evidence at the sessions, or stated in the special case (*r*). If a pauper has no known place of settlement in England, and was not born in Scotland, Ireland or other part of the united kingdom, then he must remain of necessity in the place where he has become chargeable; and he may claim relief there so long as he continues to be in want, upon the same footing with its settled poor, unless some place be afterwards discovered wherein he may claim a settlement.

(*n*) With regard to the practice on removal appeals, a recent and important case is that of the Queen *v.* Sussex, 4 Best & Smith, 966.

(*o*) 4 & 5 Will. 4, c. 76, s. 82; 12 & 13 Vict. c. 45, ss. 4, 5.

(*p*) 4 & 5 Will. 4, c. 76, s. 84.

(*q*) A *special case* may also be stated, by consent of parties and judge's order, immediately after notice of appeal, and without any resort to the court of quarter sessions, 12 & 13 Vict. c. 45, s. 11. The matter may also be referred to *arbitration*, sects. 12—15.

(*r*) The decision of the sessions as to the sufficiency of grounds of appeal cannot be reviewed on certiorari. (12 & 13 Vict. c. 45, s. 9.) As to the practice on a settlement order of sessions removed by certiorari, see R. *v.* Abergele, 5 Ad. & E. 795.

There are moreover some particular cases in which the removal of a casual pauper to his or her place of settlement or birth is illegal. For the wife of such a pauper cannot be removed to her place of maiden settlement, so as to separate her from her husband, unless by mutual consent (*s*); nor can a child (whether legitimate or otherwise) be taken away from its mother during its time of nurture, that is, until the age of seven years (*t*). And even though an order of removal be duly made, still if the pauper, by reason of sickness or infirmity, be found not in a state to travel, it must be suspended till the justices are satisfied that it may be safely executed (*u*); and such suspension shall moreover extend to any other of the pauper's family who shall be included in the removal order or warrant (*x*). With respect also to persons who are in legal custody, it is to be observed they cannot be removed under the poor laws, from the parish where they happen to be confined (*y*). And it is now also provided (in addition to the restrictions against removal already mentioned) that no person can be removed from a parish or union in which he has resided for *one whole year* next before the application for a warrant for his removal (*z*); nor can he be removed for becoming

(*s*) See R. *v.* Eltham, 5 East, 113; R. *v.* St. Mary, Beverley, 1 B. & Ad. 201.

(*t*) Cald. 6; R. *v.* Birmingham, 5 Q. B. 210.

(*u*) See 35 Geo. 3, c. 101, s. 2; 49 Geo. 3, c. 124: The Queen *v.* Llanllechid, 2 Ell. & Ell. 530. In the case of a removal to *Scotland* or *Ireland*, the justices must *see* the persons to be removed, before enforcing the order. (See 24 & 25 Vict. c. 76, and 25 & 26 Vict. c. 113.)

(*x*) 49 Geo. 3, c. 124.

(*y*) As to the relief of persons in prison, see 19 Car. 2, c. 4; 23 Geo. 3, c. 23, s. 2; 52 Geo. 3, c. 160; 58 Geo. 3, c. 113; 9 Geo. 4, c. 40.

(*z*) 28 & 29 Vict. c. 79, s. 8. (See Machynlleth *v.* Pool, Law Rep., 4 Q. B. 592.) Prior to this enactment the period of residence conferring the status of irremovability was (under 24 & 25 Vict. c. 55) *three* years, and under earlier statutes (9 & 10 Vict. c. 66; 11 & 12 Vict. c. 111) *five* years. It is to be observed that from the computation of the required period

chargeable in respect of relief made necessary by sickness or accident, unless the justices shall state in the warrant that they are satisfied that the sickness or accident will produce permanent disability (*a*). Moreover, a woman residing with her husband at the time of his death cannot be removed till twelve calendar months afterwards (*b*), if she shall so long continue a widow (*c*); nor can a child under the age of sixteen, whether legitimate or illegitimate, residing with his or her father or mother, stepfather or stepmother, or reputed father, be removed unless the person with whom such child is residing may lawfully be removed (*d*). But, on the other hand, no person exempted by residence from liability to removal shall, by reason of such exemption, acquire any settlement in any parish (*e*).

must be excluded any time passed in prison (see The Queen *v.* Potterhanworth, 1 E. & E. 262), or in military or naval service (see Queen *v.* East Stonehouse, 4 Ell. & Bl. 901; Easton *v.* St. Mary, Marlborough, Law Rep., 2 Q. B. 128); or as an in-pensioner in Greenwich or Chelsea hospitals; or in confinement in a lunatic asylum; or as patient in a hospital; or during which parochial relief shall have been received. (See The Queen *v.* St. George's Bloomsbury, 4 B. & Smith, 108). As to the effect of *interruption* of the residence, see 12 & 13 Vict. c. 103, s. 4, and the following cases:—R. *v.* Stapleton, 1 E. & B. 766; Wellington *v.* Whitchurch, 4 B. & Smith, 100; The Queen *v.* St. Leonard's Shoreditch, Law Rep., 1 Q. B. 21; *v.* Glossop, ib. 227; The Queen *v.* Whitby, ib., 5 Q. B. 325; The Queen *v.* Abingdon, ib. 406.

(*a*) See The Queen *v.* St. George's, Middlesex, 2 B. & Smith, 317.

(*b*) See Reg. *v.* Cudham, 1 E. & E. 409.

(*c*) 9 & 10 Vict. c. 66, s. 2. The case of a married woman *deserted* by her husband is provided for by 24 & 25 Vict. c. 55, s. 3; which renders her irremovable after a residence for three years as if she were a widow, unless her husband shall return to cohabit with her. (See The Queen *v.* St. Mary's, Islington, Law Rep., 5 Q. B. 445.) As to the removal of a married woman whose husband has no settlement, see The Queen *v.* St. George's-in-the-East, Law Rep, 5 Q. B. 364.

(*d*) 9 & 10 Vict. c. 66, s. 3. Where a child under the age of sixteen, residing with its surviving parent, shall be left an *orphan*,—and such parent shall, at the time of death, have acquired by continued residence an exemption from removal,—the orphan shall be exempt from removal, as if he had himself acquired an exemption by residence. (See 24 & 25 Vict. c. 55, s. 2; The Queen *v.* St. Mary Arches, Exeter, 1 B. & Smith, 890.)

(*e*) 9 & 10 Vict. c. 66, s. 5.

The duty of administering *relief*, where a parish is under the government of guardians, or of a select vestry, belongs to those authorities, according to the provisions of the Acts under which they have been respectively appointed, and subject to the rules of the Local Government Board (*f*). Where there are no such authorities it belongs (subject to the same rules) to the overseers; or, where there is a local act of parliament on the subject, to the authorities by such Act established (*g*).

In all cases, however, of *sudden and urgent necessity* arising in a parish under the government of guardians or a select vestry, any overseer is empowered and required by law, whether the applicant for relief is settled in the parish or not, to give such temporary relief as the case may require; which he is directed to do in articles of absolute necessity, but not in money. And if the overseer refuses to give such necessary relief, and the pauper is not settled or usually resident in the parish to which the overseer belongs, any justice of the peace may direct it to be given by an order under his hand or seal; and if the overseer disobeys such order he incurs a penalty not exceeding 5*l.* (*h*). Whatever be the settlement or residence of the pauper, any justice of the peace is also empowered, in a

(*f*) It has been already stated that where the parish is part of a union under the Poor Law Amendment Acts, *the cost of* the relief is now borne by the common fund (vide sup. p. 51). Any question as to the expense of relief between any parishes in a union, or between the guardians and any of the parishes therein, may be submitted by the parties to the Local Government Board. (11 & 12 Vict. c. 110; 34 & 35 Vict. c. 70.)

(*g*) Where, in any union or parish the relief of the poor, or the making and levying of the poor rate, is regulated by any local Act, the Local Government Board has nevertheless a general superintendence. (See the Queen *v.* Poor Law Commissioners, 17 Q. B. 445; *r.* Robinson, ib. 466.) And by 30 & 31 Vict. c. 106, s. 2, the Board may, at the request of the guardians of any such union or parish, not being within the metropolis, make a provisional order (to be submitted to parliament for confirmation) for the repeal or alteration of the local Act. As to parishes under local Acts, see also 7 & 8 Vict. c. 101, ss. 64, 65; and 11 & 12 Vict. c. 91, s. 12. And as to the relief of the poor in extra-parochial places, see 20 Vict. c. 19.

(*h*) 4 & 5 Will. 4, c. 76, s. 54.

parish similarly circumstanced, to order *medical* relief in all cases of sudden and dangerous illness; the overseer here also being subject to the penalty of 5*l.*, in case of disobedience (*i*). And, in unions formed under the Poor Law Amendment Acts, any two justices of the peace usually acting for the district may, at their discretion, order any adult person, who is entitled to relief, and unable to work, to be relieved, if he desires it, without residing in the workhouse. It is provided, however, that one of the justices shall certify in such order, of his own knowledge, that the person is unable to work (*k*).

These powers of overseers and magistrates to afford relief in particular cases, apply (it will be observed) only to parishes under the management of guardians or a select vestry (*l*). In parishes not so circumstanced, their authority in this matter is not specific but general. The duty of administering relief belongs universally, and (in the first instance) exclusively, to the overseer. But if he refuses it in any case in which it is reasonably claimed, it may be ordered by any justice of the peace residing in the parish, or (if there be none resident) in the parish next adjoining, or by order of the justices in their respective quarter sessions; and if the overseer disobeys such order he may be indicted (*m*).

The duty of making and levying the poor rate, or parochial fund, out of which the relief is to be afforded, still belongs (as before the late change in the law of relief) to the churchwardens and overseers (*n*); and the concurrence of the inhabitants is not necessary (*o*). But, for the better

(*i*) 4 & 5 Will. 4, c. 76, s. 54.

(*k*) Sect. 27. As to out-door relief, see 11 & 12 Vict. c. 91, s. 12. As to the power of guardians to grant out-door relief, in order to enable a pauper to provide *education* for his child, vide post, p. 108.

(*l*) 4 & 5 Will. 4, c. 76, s. 54.

(*m*) 3 W. & M. c. 11, s. 11; 9 Geo. 1, c. 7, s. 1.

(*n*) As to the recovery of poor rates and other local taxes, see 43 Eliz. c. 2, ss. 12, 13; 12 & 13 Vict. c. 14; 25 & 26 Vict. c. 82.

(*o*) 43 Eliz. c. 2, s. 1; 7 & 8 Vict. c. 101, s. 63.

execution of these duties, the statutes authorize the appointment of *collectors and assistant overseers* (*p*). The rate is raised prospectively (*q*) for some given portion of the year, at so much in the pound, according to the parochial assessment, and upon a scale adapted to the probable exigencies of the parish (*r*). By 43 Eliz. c. 2, it is directed to be raised by taxation of every "occupier of "lands, houses, tithes impropriate, propriations of tithes, "coal mines (*s*) or saleable underwoods" (*t*) in the parish; and as *occupier* (*u*) a man is rateable for all which he occupies in the parish, whether he is resident therein or not (*v*). As the general rule, the tenant (and not the

(*p*) See 2 & 3 Vict. c. 84; 7 & 8 Vict. c. 101, ss. 61, 62; 29 & 30 Vict. c. 113, s. 10. As to the appointment, &c. of overseers and assistant overseers, see R. *v.* Watts, 7 A. & E. 461; The Queen *v.* Greene, 17 Q. B. 793; Worth *v.* Newton, 10 Exch. 247. As to collectors of poor's rate and their remuneration, see Smart *v.* The Guardians of the Poor of the West Ham Union, 11 Exch. 867.

(*q*) As to the objection that the rate is retrospective, see R. *v.* Gloucester, 5 T. R. 346.

(*r*) 1 Nolan, 61, 62.

(*s*) *Iron* mines are not rateable. (See Crawshay *v.* Morgan, Law Rep., 4 Q. B. 581.)

(*t*) As to *underwoods*, see Lord Fitzhardinge *v.* Pritchett, Law Rep., 2 Q. B. 135.

(*u*) As to occupier as *servant*, see R. *v.* Wall Lynn, 8 A. & E. 379. And see R. *v.* Ponsonby, 3 Q. B. 14. As to the principle on which all property capable of *beneficial occupancy* is to be assessed, see The Mersey Dock Cases, 11 House of Lords' Cases, 443; The Queen *v.* Sherford, Law Rep., 2 Q. B. 503; Grant *v.* Oxford Local Board, Law Rep., 4 Q. B. 9.

(*v*) As to *scientific and literary societies*, see 6 & 7 Vict. c. 36; Russell Institution *v.* St. Giles, 3 Ell. & Bl. 416; St. Anne *v.* Linnean Society, ibid. 793; Marylebone *v.* Zoological Society, ibid. 807; Purchas *v.* Holy Sepulchre, 4 Ell. & Bl. 156; Bradford *v.* Bradford, 1 E. & E. 88. As to *public* or *corporate* property, 4 & 5 Vict. c. 48; R. *v.* York, 6 A. & E. 419; The Queen *v.* Mayor of Oldham, 3 Q. B. 474; Reg. *v.* Shee, 4 Q. B. 2; De la Beche *v.* St. James, 4 Ell. & Bl. 385; Smith *v.* Birmingham, 7 Ell. & Bl. 483; Re Oxford Poor Rate, 8 Ell. & Bl. 184; Lancashire *v.* Stretford, 1 Ell. Bl. & Ell. 225; Liverpool *v.* Liverpool, 5 H. & N. 526; Tyne *v.* Chirton, 1 E. & E. 516; Lancashire *v.* Cheetham, Law Rep., 3 Q. B. 14. As to *crown* property, Netherton *v.* Ward, 3 B. & Ald. 21; Tracey *v.* Taylor, 3 Q. B. 966; The Queen *v.* Stewart, 8 Ell. & Bl. 360; Leith Harbour *v.* Inspector of the Poor, Law Rep., 1

landlord) is considered as the occupier within the statute (*w*); but if the hereditament rated be let to him for a term not exceeding three months, he is entitled by 32 & 33 Vict. c. 41, s. 1, to deduct the amount paid by him in respect of poor rate from the rent due to the owner (*x*). The Act of Elizabeth further directs the rate to be raised by the taxation of "every inhabitant, parson, vicar and other" of the parish; and as an *inhabitant* a man was formerly liable to be rated according to his apparent ability, that is, according to the value of the stock in trade and other local and visible personal property he had within the parish, and of which he made profit (*y*); but the liability to taxation in regard to inhabitancy is now taken away until 1st October, 1874, and thence to the end of the next session of parliament (*z*). Moreover, by 3 & 4 Will. IV. c. 30, all churches, chapels and places of worship are exempted from taxation; and by 32 & 33 Vict. c. 40, no building shall be rated which is used exclusively as a Sunday or Ragged school.

Scotch App. 17; The Queen *v.* Leicester, Law Rep., 2 Q. B. 493; R. *v.* M'Cann, Law Rep., 3 Q. B. 141, 677. As to premises used for *charitable purposes*, R. *v.* Waldo, Cald. 358; R. *v.* Skerry, 12 A. & E. 84; R. *v.* Wilson, ibid. 94; R. *v.* Badcock, 6 Q. B. 787. As to *tithes* and *commutation rent charges*, R. *v.* Joddrell, 1 B. & Ad. 403; R. *v.* Barker, 6 A. & E. 388; Re Hackney Rent-charges, 1 Ell. Bl. & Ell. 1. As to *gas companies*, R. *v.* Gas Company, 6 A. & E. 634; R. *v.* Beverley, ibid. 645. As to *machinery*, Reg. *v.* Guest, 7 A. & E. 951. As to a *box at a theatre*, Reg. *v.* St. Martin, 3 Q. B. 204. As to *railway companies*, The Queen *v.* Brighton Railway, 15 Q. B. 313; South-Eastern Railway Company *v.* Dorking, 3 Ell. & Bl. 491. As to the *treasurer of a county court*, The Queen *v.* Manchester, 3 Ell. & Bl. 336.

(*w*) R. *v.* Welbank, 4 M. & S. 222.

(*x*) On the other hand, where the yearly rateable value of a dwelling house does not exceed 8*l.* (or in the Metropolis 20*l.*, in Liverpool 13*l.*, or in Manchester or Birmingham 10*l.*), the *owner* may be ordered by the vestry to be rated instead of the occupier. (32 & 33 Vict. c. 41, ss. 3, 4.)

(*y*) See R. *v.* Lumsdaine, 1 W. W. & H. 587.

(*z*) 3 & 4 Vict. c. 89; 36 & 37 Vict. c. 75. As to the former practice of rating *stock in trade*, see Report on Local Taxation, pp. 21, 35.

By 6 & 7 Will. IV. c. 96 (an Act for the regulation of parochial assessments), it was provided (*a*), that no poor-rate shall be of any force which shall not be made on an estimate of the net annual value of the several hereditaments rated,—that is to say, the rent at which the same may reasonably be expected to be let from year to year, free of all usual tenant rates and taxes, and tithes commutation rent-charge (if any), and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses (if any), necessary to maintain them in a state to command such rent. This statute also prescribes in what form the rate shall be made, and what particulars it shall comprise (*b*), and requires that the parish officers shall sign a declaration at the foot of it, to the effect that these particulars are true and correct as far as they have been able to ascertain by their best endeavours. And by 25 & 26 Vict. c. 103, and 27 & 28 Vict. c. 39, further provisions are made for securing (by a fresh valuation where required) the uniform and correct assessment of the rateable hereditaments comprised within all unions formed under the Poor Law Amendment Acts (*c*).

By 43 Eliz. c. 2, s. 1, no rate can be deemed valid unless it be allowed by two justices; and by 17 Geo. II. c. 3, public notice thereof is to be given at the parish church on the Sunday next after the same has been allowed (*d*). The allowance by the justices has been held to be a mere matter of form (*e*); but, after allowance and publication, any person aggrieved by the rate, and having reasonable

(*a*) As to this Act, see Report on Local Taxation, pp. 28, 48.

(*b*) As to the form of the rate, see The Queen *v.* Eastern Counties Railway Company, 5 Ell. & Bl. 974.

(*c*) See The Queen *v.* Justices of Kent, Law Rep., 6 Q. B. 132. As to the adoption of these provisions by unions *not* formed under the Poor Law Amendment Acts, see 25 & 26 Vict. c. 103, s. 45. As to the valuation of property in the *metropolis*, see 32 & 33 Vict. c. 67.

(*d*) As to the manner of giving notice, see 1 Vict. c. 45; Ormerod *v.* Chadwick, 16 Mee. & W. 367; Burnley, app. *v.* Methley Overseers, 1 E. & E. 789.

(*e*) R. *v.* Dorchester (Justices), Str. 393.

objection to it, as irregular and unequal, may appeal against it to the next practicable quarter sessions of the peace having jurisdiction in the place for which it is made.

But appeals against a poor-rate may also now in most cases be preferred to another jurisdiction; for by 6 & 7 Will. IV. c. 96, the justices in petty sessions shall, four times at least in every year, hold a special sessions for hearing poor-rate appeals within their respective divisions (*f*); and their decision shall be conclusive, unless the parties impugning it shall, within fourteen days, give notice of appeal therefrom to the next general sessions or quarter sessions of the peace. In either course of proceeding the justices have power to affirm, quash, or amend the rate; or, if it become necessary to set the whole aside, may order the overseers to make a new one (*g*). They have also authority to award costs to the successful party (*h*): and the court of quarter sessions may make its decision (as in the case of an order of removal), subject to a special case for the opinion of the Queen's Bench.

It is the duty of the overseers, and of all persons having the collection, receipt, or distribution of the poor-rate, to render to the proper auditors (*i*),—or, if there be none, to the guardians, or (where there are no such officers) to the justices in petty sessions,—once in every half year, (and oftener if required by the rules of the Local Government Board), an account of all monies and things received and expended and to verify the same on oath if required (*k*). And all balances remaining from time to time in the hands of the parish officers may be

(*f*) 6 & 7 Will. 4, c. 96, s. 6. See also 27 & 28 Vict. c. 39.

(*g*) 17 Geo. 2, c. 38, s. 6; 41 Geo. 3, c. 23; 6 & 7 Will. 4, c. 96, s. 6.

(*h*) 17 Geo. 2, c. 38, s. 6; 41 Geo. 3, c. 23; 6 & 7 Will. 4, c. 96, s. 6.

(*i*) See 4 & 5 Will. 4, c. 76; 7 & 8 Vict. c. 101, s. 32, and 11 & 12 Vict. c. 91.

(*k*) Any parish officer supplying, for his own profit, any goods given by way of parochial relief, incurs a penalty of 5*l*. (4 & 5 Will. 4, c. 76, s. 77; see Henderson *v.* Sherbourne, 2 Mee. & W. 236.)

recovered from them (if necessary) by a summary proceeding before two justices of the peace (*l*). Overseers are also bound to render an account at the end of their year of office (*m*).

Such are the general heads of the law relating to the poor; the great object of the whole system being to give such relief as charity requires to the necessitous and impotent poor, without affording encouragement to the idle (*n*). And it may safely be asserted that its operation can never be considered as satisfactory, except so far as

(*l*) 4 & 5 Will. 4, c. 76, ss. 47, 99; 2 & 3 Vict. c. 84; 7 & 8 Vict. c. 101, ss. 32—38. See also Sir John Hobhouse's Act (1 & 2 Will. 4, c. 60); R. *v.* St. Marylebone, 5 Ad. & El. 268.

(*m*) 4 & 5 Will. 4, c. 76, s. 47. It may be here observed, that there are a variety of other local rates which are levied upon the same assessment, and by the same officers, as the *poor's rates:* (see Report on Local Taxation, p. 62;) and returns as to most of these are by 23 & 24 Vict. c. 51, directed to be annually laid before parliament. Moreover, the county rate (as to which vide sup. vol. I. p. 129) is now raised through the agency of the guardians and overseers of the poor, and without the intervention (which the law formerly required) of the high constable.

(*n*) It has been felt necessary to condense, as far as possible, the account given of this complex subject. No mention has therefore been made in the text, of certain provisions recently introduced, which, though of considerable interest and importance, did not appear to require to be there noticed in so general an exposition of the poor law. And among these may be instanced those which have been passed for the formation of district *asylums for the temporary accommodation of the houseless poor.* (See 7 & 8 Vict. c. 101, ss. 40—54; 14 & 15 Vict. c. 105, s. 14.) For the same reason, the provisions as to the *burial*, and as to *emigration* of paupers, have been omitted. For the former, see 7 & 8 Vict. c. 101, s. 31; 11 & 12 Vict. c. 110; 18 & 19 Vict. c. 79, c. 105, ss. 11—13; 24 & 25 Vict. c. 55, s. 8. For the latter, see 4 & 5 Will. 4, c. 76, s. 62; 7 & 8 Vict. c. 101, s. 29; 11 & 12 Vict. c. 110, s. 5; 12 & 13 Vict. c. 103, s. 20; 13 & 14 Vict. c. 101, s. 4; 18 & 19 Vict. c. 119, s. 6. Among the provisions passed by, may also be mentioned those of 5 & 6 Will. 4, c. 69; 5 & 6 Vict. c. 18; 20 & 21 Vict. c. 13, and 34 & 35 Vict. c. 70, which enable parish guardians or trustees, and ecclesiastical corporations sole, to dispose of land by way of sale or exchange to be used as the *site of a workhouse;* or for any purpose relating to the relief of the poor, which the Local Government Board may approve.

it tends to promote that combined result. For while humanity and religion prescribe the succour of the destitute, nothing is more obviously unreasonable than to compel the industrious part of the community to maintain those who are unwilling but able to labour. And surely they must be very defective in foresight as well as in justice who suffer one half of a parish to continue dissolute and unemployed, and at length are amazed to find that the industry of the other half is not sufficient to maintain the whole.

CHAPTER III.

OF THE LAWS RELATING TO CHARITIES AND BENEVOLENT INSTITUTIONS.

I. CHARITIES.—From the subject of the maintenance provided by law for the destitute poor, we may pass, by no abrupt transition, to that of public charities.

Such charities have been always much favoured by the law (*a*). Thus, though gifts to *superstitious* uses were made void by a statute passed at the period of the Reformation, a distinction was allowed by the courts in favour of those for charitable purposes; which were held not to fall within the operation of that statute (*b*). For "no time," as Lord Coke observes, "was so barbarous as to abolish learning, or so uncharitable as to "prohibit relieving the poor" (*c*). And again by the 39 Eliz. c. 5, (made perpetual by 21 Jac. I. c. 1,) any person was enabled, by deed enrolled in Chancery, to found a hospital and to give it a corporate existence, with capacity to take and purchase goods and chattels, lands and tenements, to hold to them and their successors, without the king's licence (which by the statutes of mortmain is in general required where land is conveyed to a body corporate); subject only to these conditions, that the lands were freehold, in fee simple, of the clear value of 10*l.* and not exceeding that of 200*l.* per annum (*d*).

(*a*) Bac. Ab. Ch. Uses, E.

(*b*) 23 Hen. 8, c. 10. See also 37 Hen. 8, c. 4; and 1 Edw. 6, c. 14.

(*c*) Porter's case, 1 Rep. 26.

(*d*) It was subsequently enacted by 13 Geo. 3, c. 82 (see 24 & 25 Vict. c. 101), that all *lying-in* hospitals must be licensed; and provisions were made for regulating the settlement of bastards born therein.

The same disposition to favour and encourage charities has been evinced in other instances. Thus, by the Statute of Charitable Uses, (43 Eliz. c. 4,) the lord chancellor was empowered to award commissions to inquire of all gifts to such uses, and of all abuses and breaches of trust relative thereto, and to make orders for the future management of the fund (*e*); but the universities and cathedrals, and all colleges, hospitals, and free-schools, having special visitors or governors, were excepted from this provision (*f*).

And whereas the statutes of mortmain prohibit in general the endowment of collegiate or corporate bodies with land, without the king's licence; and some doubts arose at the time of the Revolution, as to the right of the crown to exercise this dispensing power (*g*); therefore, by a statute passed at that period (7 & 8 Will. III. c. 37), after reciting that it would be a great hindrance to learning and other good and charitable works, if persons inclined to grant lands to bodies incorporated for good and public uses should not be permitted to do so,—it was enacted (in confirmation and extension of the prerogative antecedently vested in the crown in this particular), that the king might grant to any persons whatever, a licence to alien, purchase or hold, in mortmain (*h*).

So far the interposition of the legislature had been uniformly favourable to charities. Some abuses, however, were afterwards found or supposed to attend the power of disposing of lands *by will*, or making them over at the approach of death, for purposes of this description; and therefore by 9 Geo. II. c. 36, (after reciting that many large and improvident alienations of land to charitable uses had of late been made by dying persons,) it was enacted that no lands or hereditaments, or money to be

(*e*) As to the proceedings under such commissions, see 1 Bac. Ab. Ch. Uses, F.; 3 Bl. Com. 436; 2 Vern. 118.

(*f*) See Collison's case, Hob. 136.

(*g*) See Hovenden's Blackst. vol. ii. p. 272.

(*h*) Vide sup. vol. I. p. 455.

laid out in the purchase thereof, shall be given or conveyed, or anyways charged or incumbered, in trust for or for the benefit of any such uses,—unless by such conveyance *inter vivos*, and under such conditions, as the Act specifies; and these need not here be further referred to, as we had occasion to consider this statute, and certain recent enactments by which it has been amended, in a former volume (*i*). We shall therefore only remark, in this place, that the Act does not apply to dispositions of mere personal estate, when *not* directed to be laid out in land; and that such dispositions, whether by will or otherwise, may consequently be made, without restraint, to uses of a charitable description.

Commissions under the 43 Eliz. c. 4, to redress abuses in charities, have been long disused, their place being supplied by remedies of a more simple and effective kind. For, independently of any statute, the king, as *parens patriæ*, has the general superintendence of all charities not otherwise sufficiently protected; which he exercises by the keeper of his conscience, the chancellor (*k*). And, therefore, whenever it is necessary, it has been usual for the attorney-general, at the relation of some informant (who is called the *relator*), to institute proceedings in chancery, in his official capacity, to have the charity properly established (*l*); and it is not essential that the relators should be the persons principally interested; for any persons (though the most remote of those who fall within the contemplaion of the charity) may stand in that capacity (*m*).

(*i*) Vide sup. vol. I. pp. 461—463.

(*k*) 3 Bl. Com. 427.

(*l*) 3 Bl. Com. 428. See Eyre *v.* Countess of Shaftesbury, 2 P. Wms. 118; Attorney-General *v.* Middleton, 2 Ves. sen. 329; Same *v.* Brereton, ibid. 426. Such proceedings have been commenced by *filing an ex officio information*, but see 36 & 37 Vict. c. 66, sched. r. 1, in reference to such as are commenced, in the High Court of Justice, after 2nd Nov. 1874.

(*m*) Attorney-General *v.* Bucknall, 2 Atk. 328.

By statute 52 Geo. III. c. 101, it is besides provided, that in every case of the breach of a trust created for charitable purposes, or wherever the direction of the court shall be deemed necessary for the administration of such a trust, any two or more persons may, on obtaining the previous sanction of the attorney or solicitor-general, apply for relief by *petition*, which shall be heard and decided in a summary way.

By another statute of the same year (52 Geo. III. c. 102) provision was also made for the registration of charitable donations, in order to prevent their benefits from being lost. A memorial—stating the funds and objects of the charities existing at the date of that Act, the names of the founders (when known), the persons having custody of the deeds of endowment, and the trustees or possessors of the estates—was directed to be registered with the clerk of the peace of the county or town, and a duplicate transmitted to Chancery. So, with respect to future charities, a like memorial was required to be registered within twelve months after the decease of the donor; but donations neither secured on land nor permanently invested in the funds, or the management of which is left to the discretion of trustees, were (with many other particular cases) excepted from the provisions of the Act.

By later enactments, however, a more efficient protection has now been thrown over the charitable endowment of the country (*n*). By 16 & 17 Vict. c. 137;

(*n*) We pass over in the text a variety of preceding efforts of the legislature in the same direction. The 58 Geo. 3, c. 21, and 59 Geo. 3, cc. 81, 91, authorized the appointment of commissioners, to inquire into endowed charities, and to certify to the Attorney-General such cases as they found to require the interference of equity. The powers of these commissioners and their successors were from time to time enlarged and continued by temporary Acts, and did not terminate until 1st July, 1837. The following statutes may also be noticed in this place:—1 & 2 Geo. 4, c. 92, empowering trustees of charity lands to exchange them in certain cases for others; 3 Geo. 4, c. 72, s. 11,

18 & 19 Vict. c. 124; 23 & 24 Vict. c. 136; 25 & 26 Vict. c. 112, and 32 & 33 Vict. c. 110 (a group of statutes known as "The Charitable Trusts Acts"), there was established a body appointed by the crown, styled the "Charity Commissioners for England and Wales," with power to examine into all charities (*o*), and to prosecute such inquiries by certain of its officers called Inspectors;—to require trustees and other persons to render to the Board written accounts and statements, or to attend and be examined on oath, in relation to any charity or its property;—to authorize suits and proceedings concerning the same;—to sanction building leases, repairs or improvements, or the sale or exchange of charity lands;—to certify to parliament their approval of any new scheme devised for the application or better management of a charity (*p*);—and to permit a great variety of other acts to be done in relation to charities, such as the varying cir-

authorizing the apportionment of the charitable endowments of any parish divided under the Church Building Acts; 9 Geo. 4, c. 85, quieting the titles of lands purchased for charitable purposes; 1 & 2 Will. 4, c. 60, s. 39, directing lists of the charitable endowments of the parish to be made by the vestries adopting that Act; 2 Will. 4, c. 57, s. 3, providing for the supply of new trustees, where the original trustees of a charity are dead and the representative of the last survivor is not to be found; 4 & 5 Will. 4, c. 76, s. 74 (and 34 & 35 Vict. c. 70), empowering the Local Government Board to require, from trustees for the poor, a true account in writing of the particulars of the trust; 13 & 14 Vict. c. 60, s. 45, giving facilities as to the vesting of lands, &c., by order in Chancery, in charity trustees: 14 & 15 Vict. c. 56, facilitating the service of notices with regard to charitable institutions.

(*o*) The expression "charity," as used in these Acts, is to mean "every endowed foundation and institution within the meaning, purview and interpretation" of 43 Eliz. c. 4, or in respect of which there is an equitable jurisdiction. (See 16 & 17 Vict. c. 137, s. 66; Re Duncan, Law Rep., 2 Ch. App. 356.) It may be noticed that the jurisdiction of the Commissioners extends to a charity founded in England, but administered abroad. (In re Duncan, ubi sup. As to their jurisdiction, see also In re Sir R. Peel's School at Tamworth, Law Rep., 3 Ch. App. 543.)

(*p*) 16 & 17 Vict. c. 137, ss. 54, 60. See as an instance of an Act to confirm such a scheme, 24 & 25 Vict. c. 32.

cumstances of each case may from time to time require (*q*).

By one of the above Acts (25 & 26 Vict. c. 112), it is provided that the Board may (subject to certain restrictions and right of appeal) appoint or remove the trustees of any charity, or any schoolmaster or mistress or other officer (*r*); or order the transfer, or investment, of any charitable estate (*s*). This branch of their jurisdiction, however, is not to be exercised where the gross annual income of the charity shall amount to 50*l.* and upwards, except on the application of the majority of the trustees; nor shall any trustee be removed on the ground, only, of his religious belief (*t*). Nor shall the Board exercise such jurisdiction, in respect of any case which by reason of its contentious character, or of any special questions of law or fact which may be therein involved, or for any other reason, they may consider more fit to be dealt with by a judicial court (*u*). In a case where the gross annual income of the charity shall exceed 50*l.*, such judicial jurisdiction is exercised in Chancery. But where it shall only reach or be below that sum, then recourse must be had to the county court for the district having jurisdiction in bankruptcy; which court, after hearing the matter in open court, is to make such order therein as the case may require; though, in certain cases, the order will not be effectual until confirmed by the Charity Commissioners (*x*). And from the orders of the Board there is

(*q*) As to the Commissioners substituting, in certain cases, one bishop for another as trustee, see 21 & 22 Vict. c. 71.

(*r*) It is provided by "The Elementary Education Act, 1870" (33 & 34 Vict. c. 75, s. 78), that for the purpose of the Charitable Trusts Acts, the Education Department of the Privy Council shall be deemed to be the persons interested in any elementary school to which those Acts are applicable, in the endowment thereof.

(*s*) 23 & 24 Vict. c. 136, s. 2.

(*t*) Sect. 4.

(*u*) Sect. 5.

(*x*) 16 & 17 Vict. c. 137, s. 33; 23 & 24 Vict. c. 136, s. 11.

an appeal to Chancery, by way of petition in a summary way (*x*).

The Acts under consideration also authorize the appointment of corporate bodies, called "The Official Trustees of Charity Lands," and "The Official Trustees of Charitable Funds," in whom respectively the land, stock, securities and money of charities may, under such circumstances as pointed out therein, from time to time become vested by order of any court having jurisdiction (*y*); and the Charity Commissioners may order these corporations, respectively, to convey the land, or to assign and pay over the stock, securities and money, as they shall think expedient (*z*).

A great number of cases, however, are exempted from the operation of the Acts (*a*); and among others it is provided that they shall not extend to the universities of Oxford, Cambridge, London or Durham; or to any college or hall in those universities; or to any cathedral or collegiate church (*b*); or to the colleges of Eton and Winchester (*c*);—though any excepted charities may petition

(*x*) See 23 & 24 Vict. c. 136, s. 8, and 32 & 33 Vict. c. 110, ss. 10, 11.

(*y*) 16 & 17 Vict. c. 137, ss. 48, 53; 18 & 19 Vict. c. 124, s. 15, &c.

(*z*) Sect. 37.

(*a*) Charities or institutions *exclusively for the benefit of Roman Catholics*, were originally altogether exempted from the jurisdiction of the Charity Commissioners for a temporary period; and this was continued, by successive enactments, till 1st July, 1860 (see 22 & 23 Vict. c. 50). The law, however, regarding these charities now depends on 23 & 24 Vict. c. 134; which—in cases where an estate is given on trust for the exclusive benefit of Roman Catholics, but is invalidated by reason of certain of the trusts being superstitious or otherwise illegal—enables such estate or its income to be apportioned in chancery, or by the Charity Commissioners, and a declaration to be made that a fixed proportion thereof shall be subject to such of the trusts as are lawful, and the residue to such trusts for the benefit of persons professing the Roman Catholic religion, as the court or board may, under the circumstances, consider to be most just; and to establish any scheme for giving effect to such apportionment.

(*b*) See 16 & 17 Vict. c. 137, s. 62.

(*c*) 18 & 19 Vict. c. 124, s. 47—49.

the Board to have the benefit of the above enactments allowed to them; and any charities whatever may refer any question or dispute arising among their members, in relation to the management, to the arbitration of the Board (*d*).

Some account having now been given of the legislative enactments relating to charities, we will next advert to certain general principles which may be collected from the judicial decisions in regard to donations, trusts or endowments of this character.

By proceedings then, taken in chancery, all trustees of charities, on having committed to them trusts of a public description, may be called to account for the funds committed to their charge, or new trustees, (where circumstances so require,) may be appointed,—improvident alienations of charitable estates may be rescinded,—schemes for carrying properly into effect the intention of the donor, (where the case calls for such interference,) may be judicially projected and established,—and every species of relief afforded which it is in the nature of such institutions to require. This equitable jurisdiction, however, as exercised by the court, is not allowed to usurp upon the proper province of those to whom the administration of the charity may have been confided by the founders. In the case of corporations endowed for charitable purposes, the management is usually vested in governors, subject to a controlling or visitatorial power in the founder and his heirs, or in such persons as the founder shall appoint (*e*); and with the proceedings of such functionaries the law does not interfere, unless they have also the management of the revenues, and are found to be abusing

(*d*) 16 & 17 Vict. c. 137, ss. 63, 64; 18 & 19 Vict. c. 124, s. 46.

(*e*) See Eden *v.* Forster, 2 P. Wms. 326; 3 Salk. 379; 1 Bl. Com. 480; Philips *v.* Bury, Ld. Raym. 8; R. *v.* Governors of Darlington Free School, 6 Q. B. 682.

their trust (*g*). It is to be observed, however, that when the king is the founder of an eleemosynary lay corporation, the visitatorial power is vested in the crown, and committed by royal authority to the Lord Chancellor; who may thus be called upon to redress abuses properly falling within the province of a visitor: but this jurisdiction belongs to him in his personal character only as representative of the crown, and not as judge in chancery (*h*).

With respect to the nature of those charitable trusts, to which the jurisdiction of the court attaches, we may remark that the word *charitable* is to be here understood in a very large sense. For not only gifts for the benefit of the poor are included, but also all endowments for the advancement of learning (*i*), as well as institutions for the advancement of science and art, and for any other useful and public purpose (*k*).

The term comprises also donations for pious or religious objects; as to which we may remark, that all objects are considered as religious, which tend to the benefit either of the Established Church of England, or of any body of dissenters sanctioned by law (*l*); and that trusts for the maintenance of Roman Catholic worship are now placed on a similar footing (*m*). And though a trust for the ad-

(*g*) See the case of Kirkby Ravensworth Hospital, 15 Ves. jun. 314; 2 Ves. jun. 42; Case of Berkhampstead Free School, 2 V. & B. 138; Attorney-General *v.* Talbot, 3 Atk. 673; Same *v.* Lock, ibid. 165; Same *v.* Price, ibid. 108.

(*h*) See 1 Bl. Com. 480; Co. Litt. 96 a; Ex parte Dann, 9 Ves. 547; R. *v.* St. Catherine's Hall, 4 T. R. 233. Accordingly, this jurisdiction of the Lord Chancellor is not transferred by the Judicature Act, 1873, to the High Court of Justice established by that act. (36 & 37 Vict. c. 66, s. 17, subs. 5.)

(*i*) Attorney-General *v.* Whorwood, 1 Ves. sen. 537.

(*k*) See Attorney-General *v.* Heelis, 3 Sim. & Stu. 67; Trustees of British Museum *v.* White, ibid. 594; Howse *v.* Chapman, 4 Ves. 551.

(*l*) Attorney-General *v.* Pearson, 3 Meriv. 409; Attorney-General *v.* Cock, 2 Ves. sen. 273. See 18 & 19 Vict. c. 81, s. 9.

(*m*) See 2 & 3 Will. 4, c. 115; 18 & 19 Vict. c. 86, s. 2; 23 & 24 Vict. c. 134; sup. vol. II. p. 709.

vancement of the Jewish religion, as well as of any other faith hostile to Christianity, was once held illegal, and as such excluded from the protection of chancery (*n*); yet as regards the Jews it is now provided by 9 & 10 Vict. c. 59, s. 2, and 18 & 19 Vict. c. 86, s. 2, that her Majesty's subjects professing the Jewish religion shall be liable, in respect to their schools, places for religious worship, education, and charitable purposes, and the property held therewith, to the same laws as those to which her Majesty's protestant subjects dissenting from the Church of England are liable, and to no other (*o*). Though the definition of charitable trusts is thus wide, we are, nevertheless, to remark that it does not extend to gifts of a strictly private character; for if a sum of money be bequeathed with direction to apply it "to such purposes of benevolence and liberality as the executor shall approve," or even "in private charity," no charitable trust will be created such as will be taken cognizance of in chancery, but the property will belong to the next of kin free from any condition (*p*). On the other hand, where a gift is for a purpose clearly falling within the description of public charity, though expressed in the most general and indefinite terms, the trust will never be allowed to fail on account of the uncertain limitation of the objects, but the law will provide for it some particular mode of application. In some cases of this description, the right of disposition belongs to the sovereign, who makes it under the sign manual; in others, it is made in chancery (*q*).

It is a rule with respect to all charities, that the intention of the donor, so far as it is practicable and legal, shall be strictly observed; the law not permitting it to be varied without necessity, even by consent of his heirs (*r*).

(*n*) See In re Masters, &c. of the Bedford Charity, 2 Swanst. 487; 1 Dickens, 258.

(*o*) Vide sup. vol. II. p. 710.

(*p*) Morice v. Bishop of Durham, 10 Ves. 522.

(*q*) Morice v. Bishop of Durham, 1 Turn. & Russ. 260; 10 Ves. 522; Bac. Ab. Ch. Uses.

(*r*) Attorney-General v. The Margaret and Regius Professors in Cambridge, 1 Vern. 55.

But where it is incapable of being literally acted upon, or its literal performance would be unreasonable, a decree will be made for its execution, *cyprès*; that is, in some method conformable to the general object, and adhering as closely as possible to the specific design of the donor (*s*). For example, where a sum of money was bequeathed to trustees, to be distributed among the inhabitants of several specified parishes, in money, provision, physic, or clothes, as the trustees should think fit, and the fund ultimately became too large to be suitably confined to those objects,—the court directed it to be applied to the further objects of instructing and apprenticing the children of those parishes to benefit which the charity was designed (*t*). On a somewhat similar principle it was provided by 7 & 8 Vict. c. 45 (known as "Lord Lyndhurst's Act"), as to meeting-houses founded for dissenters, that, where no particular religious doctrines or mode of worship shall have been prescribed by the deed or instrument of trust, the usage of the congregation for twenty-five years shall be taken as conclusive evidence of the doctrines and worship which may be properly observed in such meeting-houses (*u*).

Lastly, we may remark, that, though among the civilians, a legacy to pious or charitable uses was entitled to a preference over other bequests in a will, it is not so by our law, which directs that in the case of a deficiency of assets, the charitable legacies shall abate in proportion with the others (*x*).

II. BENEVOLENT INSTITUTIONS.—Besides charities (properly so called), there are various institutions in this

(*s*) See Att.-Gen. *v.* Boultbee, 2 Ves. jun. 380; Att.-Gen. *v.* The Ironmongers' Company, 2 Mylne & Keen, 576; New *v.* Bonaker, Law Rep., 4 Eq. Ca. 655.

(*t*) Att.-Gen. *v.* Whitchurch, 3 Ves. 141. See also the Bishop of Hereford *v.* Adams, 7 Ves. 324; Att.-Gen. *v.* Bovill, 1 Phill. 762; Att.-Gen. *v.* Mansfield, 14 Sim. 601.

(*u*) See Att.-Gen. *v.* Bunce, Law Rep., 6 Eq. Ca. p. 563.

(*x*) Bac. Ab. Ch. Uses, E. As to *abatement of legacies*, vide sup. vol. II. p. 206.

country, designed to encourage the industrious classes in frugal and provident habits, and to afford them some protection from those ordinary casualties which are incident to all men, but fall most severely on persons in the humbler ranks of life. Of these institutions it is remarkable, that they were all of them originally suggested and brought into use by private individuals, though they attracted at length the favourable notice of the legislature, and acts of parliament have been passed to sanction and promote them. Nor is it possible to refer to them, without pausing to pay the tribute justly due to the humanity and wisdom displayed in their establishment; for while materially contributing to the physical and moral welfare of an important portion of society, they tend by direct consequence to prevent the increase of the public burthens connected with pauperism, and the public disorders resulting from distress among the lower classes. It is but seldom that human laws are able so successfully to reconcile the interests of rich and poor; and to blend, in such perfect harmony, the considerations of benevolence and expediency.

1. *Savings banks.*—These are institutions devised for the safe custody and increase of the small savings of the industrious poor; and when regulated according to act of parliament, certain benefits and protections are afforded to them by law (*y*). The statute containing the existing regulations is the 26 & 27 Vict. c. 87 (*z*), by which also the previous enactments then in force on this subject were

(*y*) By 5 & 6 Vict. c. 71 (amended by 8 & 9 Vict. c. 27; 12 & 13 Vict. c. 71, and 22 & 23 Vict. c. 20), savings banks are provided for non-commissioned officers and soldiers in the army; and by 17 & 18 Vict. c. 104, s. 180; 18 & 19 Vict. c. 91, s. 17; 19 & 20 Vict. c. 41, and 29 & 30 Vict. c. 43, for seamen in the navy and mercantile marine. The provisions of these statutes are not included in the text.

(*z*) There are also the 16 & 17 Vict. c. 45, and 27 & 28 Vict. c. 43, with respect to the grant of *government annuities* to depositors in savings banks, as to which vide post, p. 84.

repealed (*b*). The institutions thus sanctioned consist of banks for the receipt of small deposits of money, the produce of which is to accumulate at compound interest, and the principal and interest whereof are to be paid out to the depositors as required, deducting only the necessary expenses of management. The deposits from a single depositor are not to exceed 30*l.* in the whole in any one year (*c*); and no fresh deposit is to be received from him when the sum (inclusive of interest) amounts to 150*l.* And where the sum standing in the name of any depositor amounts to 200*l.* (principal and interest included), no interest shall be paid thereon so long as it remains at that amount (*d*). The management of these banks is vested in trustees, who must (by the rules of the bank) be prohibited from receiving, directly or indirectly, any benefit from any deposit made therein (*e*); and who are required to remit the money deposited (with the exception of what is retained in the hands of the treasurer to answer exigencies) to the Bank of England (*f*). The monies so remitted are carried to an account kept in the names of the commissioners for reduction of the national debt, and denominated "The Fund for the Banks for Savings;" which affords interest to the trustees at the rate of 3*l.* 5*s.* per cent. per annum, and the arrears of which are carried half-yearly to the account of the principal (*g*). But the interest payable to depositors themselves is limited to 3*l.* 0*s.* 10*d.* per cent. per annum (*h*). Provisions are also

(*b*) Viz. the 9 Geo. 4, c. 92; 3 & 4 Will. 4, c. 14; 7 & 8 Vict. c. 83; 22 & 23 Vict. c. 53, and 23 & 24 Vict. c. 137. As to the *post office* savings banks, vide post, p. 84.

(*c*) 26 & 27 Vict. c. 87, s. 39.

(*d*) Ibid.

(*e*) Sect. 6.

(*f*) Sect. 15.

(*g*) Sect. 21. The commissioners for the reduction of the national debt are (sect. 19) required to invest all monies so carried to their account in some parliamentary security, created or issued under the authority of acts of parliament, for the interest on which provision is made by parliament; or else in stock, debenture or other security expressly guaranteed by authority of parliament. As to the investment of savings bank monies by the commissioners, see also 32 & 33 Vict. c. 59.

(*h*) 26 & 27 Vict. c. 87, s. 23.

made to save all unnecessary expense and inconvenience to the members of these institutions. Thus, in the case of the decease of a depositor whose estate does not exceed 50*l.*, no legacy duty attaches, and no stamp duty is payable on the probate or administration (*i*). And if any person die having a deposit not exceeding 50*l.* exclusive of interest, and no will or letters of administration be produced within one month afterwards, the money may be paid to such person or persons as shall appear to the trustees or managers to be the widow, or entitled under the Statute of Distributions or the rules of the bank (*k*). Upon the same principle it is directed, that deposits by or on behalf of a minor may be paid to such minor himself (*l*); and that all disputes between the institution at large and any of its members or their representatives shall be referred to a cheap method of arbitration pointed out for that purpose (*m*). It was also provided by 26 & 27 Vict. c. 87, that the trustees should pay over all deposits made by a married woman to such woman herself, unless her husband should give notice of the marriage and require payment to be made to himself (*n*). But the law as to this is now altered,—it being enacted by "The Married Women's Property Act, 1870" (33 & 34 Vict. c. 93), s. 2, that any deposit made after the date of that Act in the name of a married woman, or in the name of a woman who shall marry after such deposit, shall be deemed to be her separate property, and the same shall be accounted for and paid to her as if she were an unmarried woman (*o*).

(*i*) 26 & 27 Vict. c. 87, ss. 41, 42.

(*k*) Sect. 43.

(*l*) Sect. 30.

(*m*) Sect. 48. See the following decisions on the provisions on this subject contained in one or other of the former Acts: Crisp *v.* Bunbury, 8 Bing. 394; R. *v.* Witham Savings Bank, 1 Ad. & E. 320; R. *v.* Mildenhall Savings Bank, 6 Ad. & E. 952; R. *v.* Norwich Savings Bank, 9 Ad. & E. 729.

(*n*) Sect. 31.

(*o*) By sect. 9 however of the above Act, should any question arise between husband and wife as to her separate property, it is to be decided (at the option of either party) on application in chancery or to the county court of the district; and in case of

Any persons forming themselves into a society for the purpose of establishing a savings bank, are entitled to claim for it the benefit of the parliamentary provisions, upon causing the established rules and regulations to be entered in a book, to be kept by one of its officers for the inspection of depositors. It is also requisite, however, that two copies of the rules shall be submitted to a barrister officially appointed for the purpose, who is to certify whether the rules are in conformity to law, and pursuant to the legislative enactments (*o*). And the formation of the bank (in the case of one established after the 28th July, 1863) must be also sanctioned by the commissioners for reduction of the national debt (*p*).

In connection with these institutions it may be here noticed that, by 16 & 17 Vict. c. 45 (as amended by 27 & 28 Vict. c. 43), the commissioners just mentioned may grant to any depositor in a savings bank, or other person whom they shall think entitled to become such depositor, an *immediate* or a *deferred* life annuity depending on a single life, or an *immediate* annuity depending on joint lives with benefit of survivorship or on the joint continuance of two lives, or a sum (not exceeding 100*l.*) to be paid on the death of any person. These annuities and insurances are placed under the management of the same officers as those who conduct the *Post Office* savings banks about to be mentioned.

For the institution of savings banks, in general, being considered as of high importance, both in a moral and political aspect, and as well deserving encouragement and aid from the legislature—it has been recently thought expedient to establish a system for the deposit of small savings at interest, which should be managed by the authorities at the Post Office, and enjoy the advantage of the

a *savings bank deposit*, it may be ordered to be paid over to the husband if it appear to the court to have been made by means of his money without his consent. (33 & 34 Vict. c. 93, s. 2.)

(*o*) 26 & 27 Vict. c. 87, s. 4.

(*p*) Sect. 2.

direct security of the government for the repayment of the deposits. The Act passed to carry out this design was the 24 & 25 Vict. c. 14 (*q*), which authorizes the post-master general, with the consent of the commissioners of the treasury, to cause his officers to receive deposits, in all towns in which a branch office for that purpose is appointed, for remittance to the principal office; and to repay the same under such regulations as shall from time to time be prescribed (*r*). Each depositor is to receive from the post-master general, through the branch office at which the deposit is made, an acknowledgment of its amount, which shall be conclusive evidence of his claim to repayment within ten days after demand, with interest thereon at the rate of 2*l.* 10*s.* per cent. per annum (*s*). The monies deposited are to be forthwith paid over to the commissioners for the reduction of the national debt (*t*), to be by them invested in such securities as are lawful for the funds of other savings banks (*u*); and if at any time the funds so created shall be insufficient to meet the lawful claims of all depositors, the treasury is empowered to make such deficiency good out of the consolidated fund (*x*). And it is further enacted, that the accounts both of the post-master general and of the commissioners for the reduction of the national debt, in respect to all monies deposited with or invested by them under the Act, shall be audited by the comptroller general of the exchequer and auditor general of the public accounts (*y*), and that an account of all deposits received and paid during the

(*q*) This statute was amended in some particulars, other than those referred to in the text, by the 26 & 27 Vict. c. 14.

(*r*) 24 & 25 Vict. c. 14, s. 1. By 30 & 31 Vict. c. 142, s. 6, money paid into a county court in the course of any equitable proceedings instituted therein, is to be paid in by the registrar into the Post Office Savings Bank established in the town in which the court is held.

(*s*) 24 & 25 Vict. c. 14, ss. 2, 3, 7.

(*t*) Sect. 5.

(*u*) Sect. 9. Vide sup. p. 82, n. (*g*).

(*x*) Sect. 6.

(*y*) Sect. 13. See 29 & 30 Vict. c. 39, s. 5.

current year shall be submitted to both houses of parliament (*z*). The Act also contains provisions enabling any person making deposit under it, to transfer the amount to any savings bank managed by trustees; and for the transfer, on the other hand, of the amount due to any depositor in any such savings bank, to the post-master general (*a*).

2. *Friendly societies.*—The statutes by which these are now governed are the 18 & 19 Vict. c. 63, the 21 & 22 Vict. c. 101, and the 23 & 24 Vict. cc. 58, 137 (*b*).

A society of this description may have for its object the raising of a fund by subscription for any of the following purposes: 1. The insurance of money to be paid on the birth of a member's child or the death of a member, or for the funeral expenses of the wife or child of a member (*c*). 2. The relief or maintenance of the members, their husbands, wives, children, brothers, sisters, nephews or nieces in old age, sickness or widowhood, or the endowment of members or nominees of members of any age. 3. Any other purpose which shall be authorized by a principal secretary of state, as one to which the powers and facilities of the Acts ought to be extended. But for whatever purpose established, the sum payable on death, or other contingency, to any one member, must not exceed 200*l.*; nor can he subscribe for an annuity exceeding 30*l.* per annum (*d*). And special provisions are made to prevent

(*z*) 24 & 25 Vict. c. 14, s. 12.

(*a*) Sect. 10. And see 26 & 27 Vict. c. 14.

(*b*) By 18 & 19 Vict. c. 63, the previous enactments as to friendly societies are repealed, with the exception of 17 & 18 Vict. c. 56; but that Act has reference only to a certain class of societies, viz. those which grant policies of assurance in the event of death exceeding the sum of 1,000*l.*, and such societies are no longer to be deemed "friendly societies."

(*c*) By 17 & 18 Vict. c. 105, s. 44, 22 & 23 Vict. c. 40, s. 23, and 23 Vict. c. 13, no man shall forfeit any interest he may possess in any friendly or benefit society, by reason of his enrolment or service in the militia, naval coast volunteers, volunteer force of seamen, or in any corps of yeomanry or volunteers.

(*d*) 18 & 19 Vict. c. 63, s. 9.

fraud and mal-practices, in the case of the insurance of money payable on the death of a child under ten years (*e*).

The trustees of friendly societies are required from time to time (with the consent of the society), to invest the funds thereof in some savings bank, or in the public funds, or with the commissioners for the reduction of the national debt, or in such other manner as sanctioned in the Acts (*f*). And all real and personal estate belonging to the society becomes vested in the trustees thereof and their successors without any conveyance or assignment whatever, except in the case of stock in the public funds, which shall be transferred into the name of any new trustees (*g*). And in the event of the death or bankruptcy of, or process issued against, any officer of the society having its monies in his hands, a priority of payment is secured to the institution (*h*). It is also provided, that if any officer of the society or other person shall by false representation or imposition obtain possession of any of its property,—or, having the same in his possession, shall withhold or misapply the same,—the money may be recovered, and the offender subjected to a penalty, by a summary proceeding before justices of the peace (*i*). And all applications for the removal of any trustee, or other relief, order, or direction, or for the settlement of disputes,—where there is no other method prescribed by the society's

(*e*) In case of a sum insured to be paid on the death of a member's child, under the age of ten, for the funeral expenses, payment can only be made to the party applying on his producing a medical certificate as to the probable cause of death. And it is unlawful to pay, on the death of such child under the age of five years, any sum which shall raise the whole amount receivable above 6*l*., or, if between the ages of five and ten, above 10*l*. (21 & 22 Vict. c. 101, s. 2.)

(*f*) 18 & 19 Vict. c. 63, ss. 32, 33. As to how money remitted to them may be invested by such commissioners, vide sup. p. 82, n. (*g*).

(*g*) Sect. 18.

(*h*) Sect. 23. It appears to be open to doubt whether this privilege, in the event of *bankruptcy*, is still in force, having regard to "The Bankruptcy Act, 1869" (32 & 33 Vict. c. 71), s. 32.

(*i*) 18 & 19 Vict. c. 63, s. 24. See Ex parte O'Donnell, Law Rep., 1 Q. B. 274.

rules (*k*),—are to be made to the county court of the district within which the usual or principal place of business of the society shall be situate (*l*); and the decision of such court is not subject to appeal (*m*).

Persons wishing to establish a society of this description, may make such rules as they think proper for the purpose (*n*). But two copies of such rules must be made out and transmitted to the "Registrar of Friendly Societies;" and when certified by him as conformable to law and to the Acts, one of them is to be returned to the society, and the other is to be kept by him in such manner as shall be from time to time directed by one of the principal secretaries of state (*o*). Upon being so certified, the rules take immediate effect, and are binding in point of law on all the parties concerned (*p*).

It deserves to be noticed here, that it forms one of the

(*k*) 18 & 19 Vict. c. 63, ss. 9, 24, 44; Hornby *v.* Close, Law Rep., 2 Q. B. 153. In some instances, by the rules of the society, disputes are to be settled by justices. (See 21 & 22 Vict. c. 101, s. 5; The Queen *v.* Lambarde, Law Rep., 1 Q. B. 388; Callaghan *v.* Dolwin, ib., 4 C. B. 288.)

(*l*) See Shea *v.* St. Patrick, Law Rep., 3 C. B. 21.

(*m*) 18 & 19 Vict. c. 63, s. 41. See In re Meredith & Whittingham, 1 C. B. (N. S.) 216; Hull *v.* M'Farlane, 2 C. B. (N. S.) 796; Smith *v.* Pryse, 7 Ell. & Bl. 339; Hoey *v.* M'Farlane, 4 C. B. (N. S.) 718; Ex parte Wooldridge, 1 B. & S. 844; Callaghan *v.* Dolwin, ubi sup. See also County Court Rules and Orders, 1867, Nos. 269, 270.

(*n*) 18 & 19 Vict. c. 63, s. 25. As to the manner in which societies may be dissolved, and the funds divided, see sect. 13; 21 & 22 Vict. c. 101, s. 8; 23 & 24 Vict. c. 58, ss. 1, 3, 5.

(*o*) 18 & 19 Vict. c. 63, s. 26.

(*p*) Ibid. It is also provided (sect. 11), as to all benevolent institutions "formed for the purpose of "relieving the physical wants and "necessities of persons in poor cir-"cumstances, or for improving the "dwellings of the labouring classes, "or for granting pensions, or for "providing habitations for the mem-"bers or other persons elected by "them," that if two copies of their rules be transmitted to the registrar, and he shall certify them as not repugnant to law, certain portions of the above Act shall be applicable to such institutions; and among others, that which establishes the jurisdiction of the county court in cases of dispute among the members, or between the members and the officers of the society.

provisions of "The Married Women's Property Act, 1870" (33 & 34 Vict. c. 93), that any woman married, or about to be married, may apply, in writing, to the trustees of any friendly society, that any share, benefit, debenture, right, or claim whatsoever upon the funds of the society, to the holding whereof no liability is attached, and to which the woman applying is entitled, may be entered in the books of the society in her name (or intended name) as being entitled thereto *to her separate use*, whereupon it shall be deemed to be her separate property, and be transferable and payable to her, with all dividends and profits thereon, as if she were an unmarried woman (*q*).

3. *Benefit building societies.*—The sanction and assistance of the legislature have also been granted to societies established to raise a subscription fund, by advances from which the members shall be enabled to build or purchase dwelling-houses, or to purchase land,—such advances being secured to the society by mortgage of the premises so built or purchased. By the 6 & 7 Will. IV. c. 32, societies of this description, (their rules being duly certified as required by the Acts relative to friendly societies,) are enabled to transfer shares without payment of stamp duty, and to effect reconveyances of the mortgaged property by a mere receipt for the money advanced, without incurring the expense of a formal instrument (*r*). They are also made subject in general to the various provisions of the law relating to friendly societies (*s*).

(*q*) 33 & 34 Vict. c. 93, s. 5. Vide sup. p. 83, n. (*o*), which applies to friendly societies as well as savings banks.

(*r*) As to points on this statute, see Thorn *v.* Croft, Law Rep., 3 Eq. Ca. 193; Pease *v.* Jackson, ib., 3 Ch. App. 576; Laing *v.* Reed, ib., 5 Ch. App. 4.

(*s*) See in particular the provision in "The Married Women's Property Act, 1870," mentioned sup. p. 83. The following are some of the numerous cases which have arisen on the Acts relating to Benefit Building Societies:—Morrison *v.* Glover, 4 Exch. 430; Walker *v.* Giles, 6 C. B. 662; Reeves

4. *Industrial and provident societies.*—Lastly, it has been deemed expedient to extend certain of the statutory provisions relating to friendly societies, to such associations of persons (not being less in number than seven) as shall establish themselves for the purpose of carrying on any labour, trade or handicraft, whether wholesale or retail (except the business of banking), and of applying the profits for any purpose allowed by the Friendly Societies Acts, or otherwise permitted by law (*t*): and to such associations (when duly registered) it has been provided by 25 & 26 Vict. c. 87 (amended by 30 & 31 Vict. c. 117, and 34 & 35 Vict. c. 80), that certain provisions in the Acts relating to friendly societies shall apply (*u*); and (amongst others) those which have reference to exemption from stamp duties and income tax,—to the settlement of disputes by way of arbitration or otherwise, according to the rules of the society,—to the compensation of members unjustly excluded,—and to the power of justices or county courts in case of fraud or disputes not otherwise provided for (*x*). It is also enacted that no member of any society under the Act shall be entitled to hold or claim any interest therein exceeding the sum of 200*l.* (*y*);—that copies of the rules must be forwarded to the Registrar of Friendly

v. White, 17 Q. B. 995; The Queen *v.* Evans, 3 Ell. & Bl. 363; The Queen *v.* Trafford, 4 Ell. & Bl. 122; Card *v.* Carr, 1 C. B. (N. S.) 197; Farmer *v.* Giles, 5 H. & N. 753; Alexander *v.* Wornman, 6 H. & N. 100; Bottomley *v.* Fisher, 1 Hurl. & C. 211; Dean *v.* Mallard, 15 C. B. (N. S.) 19; Allard *v.* Bourne, ib. 468; The Queen *v.* D'Eyncourt, 4 B. & Smith, 820; Parker *v.* Butcher, Law Rep., 3 Eq. Ca. 762.

(*t*) By 25 & 26 Vict. c. 87, associations for working mines and quarries were excluded from the Act, but this restriction was removed by 30 & 31 Vict. c. 117.

(*u*) The provisions in the Married Women's Property Act, 1870, mentioned sup. pp. 83, 89, apply also to industrial and provident societies.

(*x*) See County Court Rules and Orders, 1867, Nos. 269, 270. The 25 & 26 Vict. c. 87, repeals the previous Acts regulating Industrial and Provident Societies, viz., 15 & 16 Vict. c. 31; 17 & 18 Vict. c. 25, and 19 & 20 Vict. c. 40.

(*y*) 25 & 26 Vict. c. 87, s. 9; 30 & 31 Vict. c. 117, s. 2.

Societies, who shall thereupon give his certificate of registration (*z*),—that, on due registration, the members of the society shall become a body corporate, with limited liability, and power to hold lands and buildings (*a*),—and lastly, that any society registered under the Act may be constituted a company under the Companies Act, 1862, by conforming to the provisions of that statute (*b*).

(*z*) 25 & 26 Vict. c. 87, s. 5; 30 & 31 Vict. c. 117, s. 4.

(*a*) 25 & 26 Vict. c. 87, s. 5; 34 & 35 Vict. c. 80, ss. 1, 2. See Queensbury Industrial Society *v.* Pickles, Law Rep., 1 Exch. 1.

(*b*) As to the 25 & 26 Vict. c. 89, vide sup. pp. 19—25. In addition to the societies of which some account has been given in the text, we may also refer to *loan* societies, which are regulated by 3 & 4 Vict. c. 110, and 26 & 27 Vict. c. 56; and to *discharged prisoners' aid* societies, as to which, see 25 & 26 Vict. c. 44; 28 & 29 Vict. c. 126, s. 42.

CHAPTER IV.

OF THE LAWS RELATING TO EDUCATION.

THERE can be no doubt that the subject of national education is one deserving the anxious attention of the legislature: for it is among persons who have to a certain extent had the advantage of intellectual culture, that the temptations to crime will ordinarily be most counteracted by the suggestions of conscience or of prudence; and it is among these, too, that the arts by which the condition of human life is improved and adorned will be found chiefly to flourish. Upon the question, however, whether it is right or expedient to enforce education among us by laws of a compulsory character, there is fairly room for difference of opinion. That it may be done without violating the principles of civil liberty, will not perhaps be doubted by those who consider it as consistent with those principles, that parents should be (as they have long been) compellable to provide, out of their means, for the *bodily* wants of those to whom they have given birth; and at all events the legislature has now determined the question in the affirmative by passing, in the year 1870, the "Elementary Education Act;" of the general nature of which and of the several Acts by which it has been subsequently amended we shall give the reader some account. But in addition to this scheme, by which a compulsory system of education is for the first time in this country enacted by positive law, there are other important measures contained in our statute book connected with the subject of education. And we shall arrange the present chapter under the

following heads:—I. As to Public Elementary Education. II. As to Public and Endowed Schools. III. As to Sites for Schools for the Poor and for Literary and Scientific Institutions. IV. As to Parliamentary Grants for the Education of the Poor. V. As to Pauper Schools. VI. As to Reformatory Schools; and VII. As to Industrial Schools.

I. As to *Public Elementary Education.*

The chief provisions on this subject will be found in the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), the general scheme of which remains unaltered, although in certain points alterations have been effected by "The Elementary Education Act, 1873" (36 & 37 Vict. c. 86 (*a*)).

For the purposes of this Act the whole of England is considered as portioned out into *school districts:* for each of which there shall be provided a sufficient amount of accommodation in public elementary schools, available for all the children resident in such district, for whose elementary education efficient and suitable provision is not otherwise made (*b*); and, as the general rule, every borough, and also every parish not included in a borough, forms a school district by itself (*c*)—though two or more adjoining districts may be united together where such union seems expedient (*d*).

When the Education Department of the Privy Council (to whom the general carrying out of the Act is entrusted) shall have given public notice that for any school district there is an insufficient amount of public school accommodation, and the deficiency shall not be supplied by private enterprise, there shall be formed for such district a school

(*a*) There are also the 34 & 35 Vict. c. 94; 35 & 36 Vict. cc. 27, 59, and 36 & 37 Vict. c. 49.

(*b*) 33 & 34 Vict. c. 75, s. 5.

(*c*) Sect. 4, and first schedule of the Act.

(*d*) Sects. 40—47. These provisions however do not affect the metropolis, which is a school district by itself with regulations of its own. (Ib. sched. 1.)

board(*e*), who shall be elected, for the term of three years, *by ballot* (*f*), and the electors thereof shall, in a borough, be the persons on the burgess roll; and, in a parish not included in a borough (or in the metropolis), shall be the rate-payers thereof(*g*).

To these school boards so appointed throughout the country is committed by the Act the working out of its provisions, though only under the general superintendence and control of the Education Department; and each board is to provide a sufficient number of public elementary schools within its district—it being provided that each of such schools shall be conducted in accordance with the regulations provided by the Act, of which the chief are: —1. That it shall not be required as a condition of any child being admitted or continuing in the school, that he shall attend or abstain from attending any Sunday school or place of public worship, or that he shall attend any religious observance or instruction from which he may be withdrawn by his parents. 2. That the period during which religious observance is practised or instruction in religious subjects given shall be at prescribed times either at the beginning or end of the school meeting. 3. That the school shall at all times be open to the inspection of any of her Majesty's inspectors of schools, who shall not, however, in the exercise of their duties, inquire into the instruction given to the scholars in religious subjects(*h*). 4. That no religious catechism or formulary which is dis-

(*e*) 33 & 34 Vict. c. 75, s. 6. The board is to consist of not less than five nor more than fifteen members, as determined by resolution of the board approved by the Education Department. (Sect. 31.)

(*f*) As to the election, see second schedule (Pt. I.), 34 & 35 Vict. c. 94; 35 & 36 Vict. c. 59; and 36 & 37 Vict. c. 86, ss. 5—9, and second schedule thereto. As to the "Ballot Act, 1872" (made applicable by the schedule last mentioned to school board elections), vide sup. vol. II. p. 371.

(*g*) 33 & 34 Vict. c. 75, s. 29. As to the election of the school board *in the metropolis*, see sect. 37, second sched., Part III., and 36 & 37 Vict. c. 86, s. 16, and second schedule thereto.

(*h*) 33 & 34 Vict. c. 75, s. 7.

tinctive of any particular denomination, shall be taught in the school (*i*).

It is to be observed that if any school board shall do or permit any act in contravention of, or fail to comply with the prescribed regulations for the conduct of a public elementary school, the Education Department may declare such board to be "in default" (*k*), and may thereupon proceed to appoint fresh members thereof; and on such appointment, the previous members shall be deemed to have vacated their offices as if they were dead (*l*): and the new members so appointed shall hold office during the pleasure of the Education Department, who, when they consider that the default has been remedied, and every thing necessary for that purpose has been carried into effect, may order that members be elected for the school board for the district, in the same manner as in the case of the first formation of the school board (*m*): or the Education Department may, if they see fit, should they be of opinion that the school board for any district are in default, or are not properly performing their duties, order the then members to vacate their seats, and the vacancies to be filled by a new election (*n*). But a special annual report is to be laid before parliament, stating the cases in which this power has been exercised, and the reasons which existed for the dissolution of the board (*o*).

Among the other provisions of the Act which require to be noticed, even in such a general account as our limits make necessary, is one by which a school board is enabled, if they think fit, from time to time for a renewable period not exceeding six months, to pay the whole or any part of the school fees payable at any school by any child resident in their district whose parent is in their opinion unable from poverty to pay the same, and this without such payment

(*i*) 33 & 34 Vict. c. 75, s. 14.
(*k*) Sect. 16.
(*l*) Sect. 63.
(*m*) Sect. 63.
(*n*) Sect. 66.
(*o*) Ibid.

being deemed to be parochial relief to such parent (*p*); and may also in their discretion sanction the establishment of a school at which no fees shall be required from the scholars, where such an institution shall be expedient for the interests of education on the ground of the poverty of the inhabitants of the place (*q*).

On the other hand, the attendance at school is, as the general rule, intended by the Act to be obligatory, and with this object every school board is authorized, with the approval of the Education Department, to make bye-laws for all or any of the following purposes:—1. Requiring the parents of children between the ages of five and thirteen to cause such children (unless there is some reasonable excuse) to attend school. 2. Determining the time during which children are so to attend school. 3. Providing for the remission or payment of the fees where the parent can establish an inability from poverty (*r*).

It is, however, required that any bye-law under which a child between the age of ten and thirteen must attend school, shall provide for its total or partial exemption from such obligation if he or she can obtain a certificate from one of her Majesty's inspectors of schools of having reached a standard of education specified in such bye-law (*s*). Moreover, any of the following reasons shall be deemed to be a reasonable excuse for the child's non-attendance:—1. That the child is under efficient instruction in some other man-

(*p*) 33 & 34 Vict. c. 75, s. 25. No such payment is to be made or refused, on condition of the child attending any public elementary school other than such as may be selected by the parent. (Ibid.)

(*q*) Sect. 26. The school board may also establish or contribute to an *Industrial School;* as to which, vide post, p. 110.

(*r*) Sect. 74.

(*s*) Ibid. There is also a proviso that no bye-law shall fix the time of attendance so as to prevent the withdrawal of the child from any religious observance or instruction, or so as to require the child to attend school on any day exclusively set apart for religious observation by the religious body to which the parent belongs, or so as to contravene the regulations of any Act regulating the education of children employed in labour. (Ibid.; see also 36 & 37 Vict. c. 86, ss. 3, 22.)

ner. 2. That the child has been prevented from attending by sickness or other unavoidable cause. 3. That there is no public elementary school open within the distance of three miles from the residence of such child (*t*).

We may conclude by remarking that the expenses of every school board are to be defrayed by fees from the scholars, by Parliamentary grants, or by monies raised by loan, (so far as such resources will go); and that any deficiency is to be raised by a local rate (*u*)—that the Education Department are required in every year to lay before both houses of parliament a report of their proceedings during the preceding year (*x*)—and that there are special provisions in the Acts with regard to the election and powers of the school board for the metropolis (*y*).

II. As to *Public and Endowed Schools.*

With respect to the schools first mentioned, it is to be observed that, in the year 1861, a royal commission issued to inquire into the endowments and management of certain of our "public schools;" and a variety of changes in the government, management and studies of the schools or colleges of Eton, Winchester, Westminster, Charterhouse, Harrow, Rugby and Shrewsbury were recommended for adoption in their report. In order to give time for deliberate consideration, a temporary Act (27 & 28 Vict. c. 92, continued by 36 & 37 Vict. c. 75) was then passed, to prevent the future acquisition of any vested interests by those holding office in the above schools, such as might impede the free action of the legislature; and Acts have now been passed to carry into effect certain of the changes recommended by the commissioners (*z*).

The general scheme thus devised is chiefly contained in the first of these, the "Public Schools Act, 1868"

(*t*) 33 & 34 Vict. c. 75, s. 74.
(*u*) Sect. 53.
(*x*) Sect. 100.
(*y*) Sect. 37.
(*z*) These are 31 & 32 Vict. c. 118; 32 & 33 Vict. c. 58; 33 & 34 Vict. c. 84; 34 & 35 Vict. c. 60; 35 & 36 Vict. c. 54; 36 & 37 Vict. c. 41, and c. 62.

(31 & 32 Vict. c. 118), and it is thereby enacted that the "governing body" which existed at the date of the Act in any of the above schools, might within a certain time proceed to make such statutes for determining and establishing the constitution of the future governing body of such school as might be deemed expedient; but that after such time had expired, all powers of making statutes with the above object should pass to certain "special commissioners" mentioned in the Act (*a*); and that the new governing body thus appointed, should have power to make regulations with respect to the number of the boys, the mode in which they are to be boarded and lodged, the payments to be made for their maintenance and education, the course of study, the powers to be committed to the head master, and the like (*b*); and also to make statutes with regard to a variety of matters connected with the school (*c*). These matters (which are too numerous for complete specification) include the privileges, numbers, and rules for admission of such boys as are on the foundation, or have rights as to education or maintenance; regulations as to the scholarships, exhibitions, and other emoluments belonging to the school; the mode and conditions of appointment to ecclesiastical benefices which shall become vested in the governing body; the number, position, rank, salaries and emoluments of the masters, and the disposal of the income of the property of the school. But all statutes in regard to these matters, and indeed all which are made with any object, must be submitted for the approval of the special commissioners already mentioned, and of her Majesty in council (*d*). It is also provided by the Act, that (subject to vested interests) the head master of every school to which it applies shall be appointed by and hold his office at the pleasure of the new governing body; and that all other masters shall

(*a*) 31 & 32 Vict. c. 118, s. 5.
(*b*) Sect. 12.
(*c*) Sect. 6.
(*d*) Sect. 9.

be appointed by and hold their offices at the pleasure of the head master (*e*).

With respect to endowed grammar schools, in which Latin and Greek or either of such languages are taught, exclusive of the public schools to which the above Acts apply, an Act passed in the year 1840 (3 & 4 Vict. c. 77), for improving the condition and extending such schools, by which it was enacted, that, whenever any question should come under consideration in equity concerning the system of education thereafter to be established in any grammar school, or the right of admission into the same, it should be lawful to make decrees or orders for extending the system of education in the school in question to other useful branches of literature and science, for regulating the right of admission into the school, or for establishing schemes for the application of its revenues,—paying due regard nevertheless to the intentions of the founders and benefactors, as well as to other circumstances; and where any special visitor exists, giving him an opportunity to be heard. In many other respects, also, this Act placed the management of such schools under the control of Chancery; and it provided that its powers might be exercised in cases brought before it on mere petition, according to the provisions of the 52 Geo. III. c. 101, with regard to charitable trusts (*f*).

Moreover, by the 23 Vict. c. 11, the trustees or governors of any endowed school (subject to a variety of exceptions particularized in the Act) were enabled to make orders for the admission of children whose parents were not in communion with the church or sect, according to whose doctrines or formularies religious instruction was to be afforded under the endowment. But, notwithstanding the

(*e*) 31 & 32 Vict. c. 118, s. 13.

(*f*) 3 & 4 Vict. c. 77, s. 21. As to the 52 Geo. 3, c. 101, vide sup. p. 73. The provisions of the Charitable Trusts Acts, (vide sup. pp. 74, 75,) seem also to apply to the grammar schools in question.

partial relief given by these enactments, it was felt that the law as to schools generally still required careful reorganization; and accordingly, in the year 1864, a royal commission issued to inquire into the education given in places of instruction not comprised in previous commissions, viz.:—1. Grammar and other endowed schools; 2. Proprietary schools; and, 3. Private schools. An elaborate report of this commission having been laid before parliament, a temporary Act (31 & 32 Vict. c. 32, continued by 36 & 37 Vict. c. 75) was passed, as in the case of the public schools already mentioned, with the object of preventing the acquisition of vested interests pending legislation on the subject; and Acts have been now passed to carry into effect some of the recommendations of the commissioners (*g*).

The general scheme thus devised is chiefly comprised in the first and last of these; that is to say, in "The Endowed Schools Act, 1869" (32 & 33 Vict. c. 56), and "The Endowed Schools Act, 1873" (36 & 37 Vict. c. 87). And by these it is provided (*h*), that her Majesty may from time to time appoint a paid board of commissioners, not exceeding three in number (*i*), to whom is entrusted the duty of preparing, after such examination or public inquiry as they may think necessary, draft schemes framed in order to render any educational endowment more conducive to the advancement of education of boys and girls. or either of them (*k*). And with this object they may in such schemes alter and add to any existing and make new trusts, directions and provisions in lieu of those

(*g*) These are 32 & 33 Vict. c. 56; 36 & 37 Vict. c. 7, and c. 87.

(*h*) The Endowed School Acts do not apply to the public schools mentioned sup. p. 97; and certain other classes of schools are also excepted from their application (32 & 33 Vict. c. 56, s. 8). Moreover, by 36 & 37 Vict. c. 87, s. 3, *elementary schools*, within the meaning of 33 & 34 Vict. c. 75, are also, in general, excepted. On the other hand, they do apply to such grammar schools (other than the above public schools) as are the subject of the provisions contained in 3 & 4 Vict. c. 77, mentioned sup. p. 99.

(*i*) 32 & 33 Vict. c. 56, s. 31. "Assistant" commissioners may be employed at the discretion of the treasury. (Ibid.)

(*k*) Sect. 9.

previously existing, and may consolidate or divide any two or more endowments (*l*). Such schemes may also contain provisions for altering the constitution, rights and powers of any governing body of an educational endowment, and establishing new governing bodies corporate or unincorporate, and may remove any governing body, or, if it shall be incorporated, may dissolve such corporation (*m*)—it being the duty of the commissioners, in every scheme whereby the privileges or educational advantages of any particular class of persons, or of persons in any particular class of life, shall be abolished or modified, to have due regard to their educational interests (*n*)—and, so far as conveniently may be, to extend the benefits of endowments to girls (*o*).

Careful enactments are also made in reference to the subject of religious teaching,—it being enacted, that in every scheme (except only such as have reference to schools maintained out of the endowment of any cathedral or collegiate church, or the scholars whereof shall be required by the founder to be instructed according to the doctrines or formularies of some particular church, sect or denomination), there shall be inserted a provision that the parent or guardian, or person liable to maintain any day scholar therein, may claim the exemption of such scholar from attending prayer or religious worship or instruction (*p*); that the religious opinions of any person shall not affect his qualification for being one of the governing body (*q*); and that he shall not be disqualified for being a master by reason only of his not being or intending to be in holy

(*l*) 32 & 33 Vict. c. 56, s. 9.

(*m*) Sects. 9, 10.

(*n*) Sect. 11; and see 36 & 37 Vict. c. 87, s. 5.

(*o*) 32 & 33 Vict. c. 56, s. 12.

(*p*) Sect. 15. With regard to *boarding* schools, the scheme is to provide, that if the persons in charge of the school are not willing to allow such exemption, the scholar may attend thereat as a day scholar, and shall still enjoy any advantage or emolument he could have claimed as a boarder. (Sect. 16.)

(*q*) Sect. 17; 36 & 37 Vict. c. 87, s. 6.

orders(*r*). Moreover, every scheme is to provide for the dismissal, at the pleasure of the governing body, of every teacher and officer in the school to which the scheme relates, including the principal teacher; with or without a power of appeal, in such cases and under such circumstances as to the commissioners shall seem expedient (*s*).

Any scheme drafted by the commissioners, as above mentioned, is to be printed and sent to the governing body of the endowment to which it relates, and also to the principal teacher of any endowment school to which it relates; and circulated in such other way as the commissioners may think proper, in order to give information to all persons interested (*t*): and if any objections are made in writing, or any alternative scheme suggested for consideration within three months of the publication of the draft scheme, the commissioners, (or an assistant commissioner,) may hold an inquiry concerning the subject-matter of the scheme; and may submit a scheme, finally approved by them, for the approval of the committee of council on education, by whom it may be approved or rejected (*u*). There is, however, power given by the Act for any person or persons aggrieved by the scheme to petition her Majesty in council to withhold her approval thereof; and it may be directed to be laid before parliament, and the consent or refusal of the crown regulated in accordance with any address made from one or both houses respecting it (*x*).

III. As to *Sites for Schools for the Poor*, and *for Literary and Scientific Institutions.*

By 4 & 5 Vict. c. 38 (*y*), passed to facilitate the conveyance and endowment of "Sites for Schools," any person,

(*r*) 32 & 33 Vict. c. 56, s. 18.
(*s*) Sect. 22.
(*t*) Sect. 33.
(*u*) Sects. 33–36.
(*x*) Sects. 39–41.
(*y*) This Act (repealing a former statute on the same subject, 6 & 7 Will. 4, c. 70) is itself explained and

seised legally or equitably in fee simple, fee tail, or for life, in any lands of freehold, copyhold or customary tenure, and having the beneficial interest therein in possession,—may grant by way of gift, sale, or exchange in fee simple, or for term of years, any quantity of such land not exceeding *one acre* as a site for a school to educate poor persons, or for the residence of the master or mistress of such a school, or otherwise for the purposes of the education of poor persons in religious and useful knowledge (*z*). But there is a proviso that no such grant shall be made by any person seised for life only, unless the person next in remainder in fee simple, or fee tail (if legally competent), shall join in such grant: and that, upon any land granted ceasing to be used for the purposes above mentioned, it shall revert to and become a portion of the estate of the former possessor thereof (*a*). It is also enacted, that land to the extent of an acre may, for the above purposes, be granted by any corporation, ecclesiastical or lay, sole or aggregate, in whom it may be, in any manner, vested, (though no ecclesiastical corporation sole below the dignity of a bishop, is to make such grant without the consent in writing of the bishop of the diocese); and that all grants for the purpose of the education of the poor may also be made *to* any corporation or trustees, to be held by them for such purposes (*b*).

Again, by 15 & 16 Vict. c. 49, all enactments in the Acts relating to grants of sites for schools, shall be construed as applicable to such schools or colleges for the

amended by 7 & 8 Vict. c. 37, 12 & 13 Vict. c. 49, and 14 & 15 Vict. c. 24. See also 22 Vict. c. 27, an Act "to facilitate grants of land to be made near populous places, for the use of regulated recreation of adults and as play-grounds for children." The powers given by the School Sites Acts are also extended by the 30 & 31 Vict. c. 133, to the case of *enlargement* of *churchyards*. And by the 33 & 34 Vict. c. 75, s. 20, to the public elementary schools established by that Act.

(*z*) 4 & 5 Vict. c. 38, s. 2.

(*a*) Ibid.

(*b*) Sects. 6, 7. And see provisions as to the appropriation, *under inclosures*, of allotments for sites of schools, 8 & 9 Vict. c. 118, s. 34; 20 & 21 Vict. c. 31, s. 13.

religious or educational training of the sons of yeomen, tradesmen or others, or for the theological training of candidates for holy orders,—as are erected or maintained in part by charitable aid, and which in part are self-supporting. There is, however, a proviso that no ecclesiastical corporation shall be authorized to grant any site under this Act, except for schools or colleges in union with the Established Church; or to grant by way of gift, without a valuable consideration, for any of the purposes of the Act, any greater quantity of land in the whole than two acres.

Finally, by 17 & 18 Vict. c. 112 (called "The Literary and Scientific Institutions Act, 1854"),—it is provided that the same facilities as are afforded by the "School Sites Acts" in respect of schools for poor persons, shall be allowed to such persons and corporations as are described in the 4 & 5 Vict. c. 38 (*c*), in reference to a site for any such institution as thereinafter described (*d*). There is, however, a proviso that no such grant made by a person seised only for life shall be valid, unless the person entitled in remainder in fee simple, or fee tail, if legally competent in that behalf, shall join in the grant. There is also a similar provision, as that in the 4 & 5 Vict. c. 38, enacting that land gratuitously granted for the purposes of an institution shall revert to the estate of the grantor, on its ceasing to be used for that purpose, except only in the case of a removal of site, when such land may be exchanged or sold for the benefit of the institution. There

(*c*) Vide sup. p. 102.

(*d*) 17 & 18 Vict. c. 112, ss. 1, 4. The description referred to in the text is in sect. 33, which provides, that the Act shall apply to every institution "for the time being "established for the promotion of "science, literature or the fine arts, "for adult instruction, the diffusion "of useful knowledge, the foundation or maintenance of libraries "or reading-rooms for general use "among the members or open to "the public, of public museums "and galleries of paintings and "other works of art, collections of "natural history, mechanical and "philosophical inventions, instruments or designs."

are also in the Act of 17 & 18 Vict. c. 112 a variety of other provisions with reference to such institutions. These relate chiefly to the persons by and to whom, and the manner in which, conveyances of their sites may be made, and as to the form of such conveyances;—as to the subsequent sale or exchange of the land conveyed;—as to the liability of the trustees in whom such land is vested, to rates, taxes, and other charges, and expenses;—as to the manner in which the personal property of the institution shall be deemed to be vested;—as to the manner in which suits by or against them may be brought, and in which judgment shall be satisfied;—as to their power to make bye-laws enforceable in the county court of the district (*e*);—as to the liability of individual members to be sued or prosecuted in matters affecting the property of the institution;—and as to the manner in which the institution may proceed to effect an alteration, extension or abridgment of the purposes for which they were established, or to effect their own dissolution, or the adjustment of their affairs (*f*).

IV. As to *Parliamentary Grants for the Education of the Poor.*

By 7 & 8 Vict. c. 37—after reciting that during several years past divers sums of money had been granted by parliament to her Majesty, to be applied for the purpose of promoting the education of the poor in Great Britain, and that similar grants might thereafter be made,—it was provided, that where any such grant had been or should thereafter be made in aid of the purchase of the site, or of the erection, enlargement, furnishing or repair of a school, or in respect of the residence of the master or mistress thereof, upon terms and conditions providing for the

(*e*) See County Court Rules and Orders, 1867, Nos. 269, 270.

(*f*) The "Royal Institution," and the "London Institution for the advancement of literature and the diffusion of useful knowledge," are exempted from the provisions of the Act (17 & 18 Vict. c. 112, s. 33).

inspection of the school by an Inspector appointed by her Majesty, such terms and conditions should be obligatory on the trustees and managers of the school, in like manner as if they had been inserted in the conveyance of the site of the school, or in the declaration of the trusts thereof: provided that such terms and conditions were set forth in some document in writing, signed by the trustees, or the major part of them, or in the case of a voluntary gift by the party conveying the site.

Again, by 18 & 19 Vict. c. 131, in order that greater security may be afforded for the due application of money advanced to the trustees or managers of schools out of such parliamentary grants for any of the above purposes, —it is provided, that where any such grant shall be made, no subsequent sale, exchange, or mortgage of the premises shall be valid, unless either the written consent of a secretary of state shall be given to the same, or else the amount of the grant be repaid. But this provision is not to affect a purchaser for valuable consideration without notice; nor to be deemed to apply to any school in respect of any grant made *previously* to the statute without any such conditions having been imposed.

It is to be observed, that any school in receipt of annual sums out of such parliamentary grants (not being a *grammar* school within 3 & 4 Vict. c. 77) is not within the provisions of the Endowed Schools Acts (*f*). And that it forms one of the provisions of "The Elementary Education Act, 1870," that after the 1st March, 1871, no parliamentary grant should be made to any elementary school (*g*) which was not a "public elementary school" within the meaning of that Act (*h*); and that no grant

(*f*) As to these, vide sup. p. 100.

(*g*) Under and for the purposes of this Act, an "elementary" school is one at which elementary education is chiefly taught, and at which the ordinary payments from each scholar do not exceed 9*d*. a week. (33 & 34 Vict. c. 76, s. 1.) A "public elementary" school is an elementary school conducted in accordance with the regulations in sect. 7; as to which, vide sup. p. 94.

(*h*) 33 & 34 Vict. c. 75, s. 96.

shall be made in respect of any instruction in religious subjects; and that the conditions on which it is given shall not turn on the fact that the school is or is not provided by a school board (*i*).

V. As to *Pauper Schools.*

By 7 & 8 Vict. c. 101, s. 40 (amended by 11 & 12 Vict. c. 82, 13 & 14 Vict. cc. 11, 101, and 31 & 32 Vict. c. 122), parishes and unions may be combined into *school districts* for the instruction of such of their chargeable infant poor (not being above the age of sixteen) as are orphans, or are deserted by their parents, or whose parents or guardians consent to their being placed in the school of such district (*k*). And by sect. 42, a Board of managers, consisting of members chosen from the rate-payers of the district, shall be constituted for every such district school (*l*); and such Board shall, with consent of the bishop of the diocese, appoint at least one chaplain of the Established Church, to superintend the religious instruction of the scholars therein (*m*); and it shall be lawful at all times for any Inspector of schools, appointed by her Majesty in council, to visit such district schools, and to examine into the proficiency of the children there taught.

By 25 & 26 Vict. c. 43, the guardians of any parish

(*i*) 33 & 34 Vict. c. 75, s. 97.

(*k*) It is to be observed, that a portion of the sum annually voted by parliament for administration of the poor laws is distributed (under the advice of the Education Committee of the Privy Council, and in relief of the poor rates) for the schoolmasters and schoolmistresses of these pauper schools. (See the Revised Code, 1862, chap. iii. part ii.)

(*l*) By 22 & 23 Vict. c. 49, provision is made for the payment of debts incurred by school district boards.

(*m*) 7 & 8 Vict. c. 101, s. 43. It is, however, provided, that no scholar shall be educated in any religious creed other than that professed by his parents, or to which his parents may object; or in case of an orphan or deserted child, to which his next of kin may object; and that a minister of the persuasion in which the child has been brought up, or in which the parents or next of kin desire him to be instructed, may *visit* such child for the purpose of giving him religious instruction.

or union are moreover enabled to send any poor child, (being an orphan, or deserted, or else with the consent of his parents,) to any school certified as fit for the purpose, and supported wholly or in part by voluntary subscriptions, and the manager whereof shall be willing to receive such child (*n*); and they are authorized to pay the expenses incurred thereby, and for the maintenance, clothing and education of the child at such school, out of the funds in their possession—to the extent, at least, of what the child's maintenance in the workhouse would have cost during the same period.

And by 36 & 37 Vict. c. 86, s. 3, it is provided that where out-door relief is given by the guardians to the parent of any child between five and thirteen years of age, or to any such child, it shall be a condition for the continuance of such relief that (in the absence of reasonable excuse) elementary education in reading, writing and arithmetic shall be provided for such child in some public elementary school to be selected by the parent; and such further relief, if any, as shall be necessary for that purpose shall be provided (*o*).

VI. As to *Reformatory Schools.*

By 29 & 30 Vict. c. 117, it is provided that a principal secretary of state (*p*) may, upon application made to him by the managers of any "reformatory school for the better training of youthful offenders," direct an inspector of prisons (who shall be styled the inspector of reformatory schools) to examine into the condition and regulations of

(*n*) The school must not, however, be one conducted on principles contrary to the religious denomination to which the child belongs (25 & 26 Vict. c. 43, s. 9); nor may it be a reformatory school (sect. 10).

(*o*) 36 & 37 Vict. c. 86, s. 3, repealing a previous enactment on this subject, known as Denison's Act (18 & 19 Vict. c. 34).

(*p*) This Act repeals the previous statutes on this subject, viz., 1 & 2 Vict. c. 82, s. 11; 17 & 18 Vict. c. 86; 19 & 20 Vict. c. 109; and 20 & 21 Vict. c. 55. Such duties as those referred to in the text, are transacted by the secretary of state for the *home department.*

such school; and (after his report in its favour) the school in question may be certified as being fit for the reception of such offenders (*q*). And it is made lawful for any court, magistrate or justice before whom a person, under the age of *sixteen*, shall be convicted, and sentenced to receive punishment to the extent of ten days' imprisonment at the least,—to direct that, at the expiration of such confinement, the offender shall be sent to some certified reformatory school (selecting, where possible, one conducted according to the religious persuasion to which the offender appears to belong) for a further period of not less than two nor more than five years (*r*). But if the offender shall be under the age of *ten*, then, in order that he may be so dealt with, the sentence must be at the assizes or the quarter sessions; or, else, he must have been previously charged with some crime punishable with penal servitude or imprisonment (*s*). And with regard to the expenses attendant on the removal, custody and maintenance of such an offender, they are to be defrayed (if of ability) by his parent or such other person as may be legally liable for his maintenance,—to the extent of five shillings per week (*t*); but the commissioners of the treasury are enabled to contribute, out of money provided by parliament, such sum as the secretary of state may recommend towards the expenses of any certified reformatory school (*u*). It is further to be observed, that such secretary may at any time order any particular offender to be discharged from the school to which he has been sent; or may direct that he be removed from one school to another (*x*).

(*q*) 29 & 30 Vict. c. 117, s. 4.

(*r*) Sect. 14.

(*s*) Ibid.

(*t*) Sect. 25.

(*u*) Sect. 24. By section 28, any "prison authority" (see 28 & 29 Vict. c. 126, s. 5) may from time to time contribute towards the expenses connected with any certified reformatory school, subject, in certain cases, to the approval of the Home Secretary.

(*x*) 29 & 30 Vict. c. 117, s. 17.

VII. As to *Industrial Schools.*

By 29 & 30 Vict. c. 118 (*y*), a principal secretary of state may, upon the application of the managers of any "industrial school," direct an examination to be made by the inspector of reformatory schools (who is also to be inspector of industrial schools) into its condition: and may then grant a certificate constituting the same a certified Industrial School within the meaning of the Act (*z*). To such a school is liable to be sent any child (not previously convicted of felony) who, being apparently under the age of twelve, is charged before two justices with having committed an offence punishable by imprisonment, or some less punishment; or who, being apparently under the age of fourteen, is brought before them as being found begging or receiving alms, or being in any street or public place for such purpose; or as being found wandering without any home or settled place of abode, or proper guardianship, or visible means of subsistence; or as found destitute (either being an orphan or having a surviving parent who is undergoing penal servitude or imprisonment), or frequenting the company of reputed thieves; or whose parent, step-parent or guardian represents that he is not amenable to his control, and that he desires him to be sent to such school (*a*); or whose mother has been convicted of a crime (a previous conviction for crime having been proved against her), and who, being under her care and control at the time of her conviction for the last of such crimes, has no visible means of subsistence or is without proper guardianship (*b*). Such a child, after full inquiry made into the facts of the case by the justices, may, if they think it expedient, be sent for such period as they may

(*y*) By this Act the Industrial Schools Act, 1831 (24 & 25 Vict. c. 113), is repealed. Provisions as to the children to be sent to such school are also contained in the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112).

(*z*) 29 & 30 Vict. c. 118, s. 7.

(*a*) Sects. 14—16.

(*b*) 34 & 35 Vict. c. 112, s. 14.

think necessary for his education and training to any certified Industrial School, the managers of which shall be willing to receive him; but not so as to extend the period of detention beyond the time when the child shall attain the age of sixteen; beyond which age, he cannot be detained except with his own consent in writing (*c*). But the Act requires that, if possible, a school shall be selected which is conducted in accordance with the religious persuasion to which the parent appears to belong; and a minister of such persuasion may visit the child for the purpose of religious instruction (*d*). The parent, or other person legally liable, may be ordered to pay a weekly sum, not exceeding five shillings, for the expenses of the child's maintenance and training at school (*e*). And the statute further enacts, that, on the recommendation of the secretary of state, funds for the custody and maintenance of children detained in certificated industrial schools may be contributed, by the Treasury, out of monies provided by parliament (*f*).

(*c*) 29 & 30 Vict. c. 118, ss. 18, 41.

(*d*) Sect. 25.

(*e*) Sects. 39, 40.

(*f*) Sect. 35. If the child has been sent on the application of its parents or guardians, the amount of such contribution by the Treasury may not exceed two shillings per head per week. (Ib.) Contributions may be also made by poor law guardians (sect. 37), by prison authorities (sect. 12), and by school boards (see 33 & 34 Vict. c. 75, s. 27, and 36 & 37 Vict. c. 86, s. 14).

CHAPTER V.

OF THE LAWS RELATING TO LUNATIC ASYLUMS, AND THEIR MANAGEMENT.

WE have had occasion elsewhere to explain the general state of the law in reference to idiots and lunatics (*a*). But the numerous provisions made by the legislature, in regard to the safe custody and proper treatment of these persons, are of a nature to deserve more particular attention than we have yet been able to bestow upon them; and we shall now advert to them more fully, under the head of Lunatic Asylums.

Houses established for the reception of insane persons are of various descriptions: some being established for the public benefit at the public expense; others being instituted for the public benefit, by endowment of charitable donors (*b*); and others, again, being private houses kept by individuals for their own profit.

We propose in the present chapter to treat, I. Of the provisions made with regard to county lunatic asylums (*c*). II. Of the provisions which have been made in regard to

(*a*) Vide sup. vol. I. p. 474; vol. II. pp. 508—514.

(*b*) As to the Royal Hospital of Bethlehem, which is one of those so endowed, see 5 & 6 Vict. c. 22; 16 & 17 Vict. c. 96, s. 35; 23 & 24 Vict. c. 60; 24 Vict. c. 12; 25 & 26 Vict. c. 104, s. 5.

(*c*) It may be here observed that most of the provisions in the Acts mentioned in this chapter extend, also, to lunatic asylums established in *boroughs*, which asylums are subject, in general, to the same regulations as the county asylums. Or the boroughs may, and in certain cases must, unite with the county in which they are situate, in the establishment and maintenance of an asylum. As to which see 16 & 17 Vict. c. 97, ss. 3, 9; 19 & 20 Vict. c. 87; 28 & 29 Vict. c. 80.

criminal lunatics: and, III. Of the provisions which have been made for the proper treatment of lunatics in general.

I. County lunatic asylums were first established by 48 Geo. III. c. 96; but the regulations respecting them now in force are contained in 16 & 17 Vict. c. 97, (called "The Lunatic Asylums Act, 1853,") as amended by 18 & 19 Vict. c. 105, 19 & 20 Vict. c. 87, 25 & 26 Vict. c. 111, and 26 & 27 Vict. c. 110. By the provisions of these Acts, it is made incumbent on the justices of every county to provide a sufficient asylum for its pauper lunatics, either separately or in union with such other parties as in the Acts mentioned in that behalf(*d*). And the expenses of such an asylum are to be defrayed out of the county rates(*e*); and the management vested in a *committee of visitors*, elected yearly by the justices, or (in case of union with some other asylum supported by voluntary subscriptions), partly by the justices and partly by the subscribers(*f*).

The purpose for which these asylums are mainly designed is, therefore, to receive the insane paupers of the county,—a class of persons for whom it may be said in general that there is no other resource; particularly since the provision of the Poor Law Amendment Act, (4 & 5 Will. IV. c. 76,) s. 45, by which it was made penal to confine any insane person, having dangerous tendencies, for more than fourteen days in any workhouse(*g*).

The provisions for the reception of pauper lunatics into these asylums are briefly as follows:—

Any relieving officer of a parish within a union, or under a board of guardians,—and every overseer of a parish where there is no relieving officer,—who shall

(*d*) 16 & 17 Vict. c. 97, s. 3.

(*e*) Sect. 46.

(*f*) Sect. 22.

(*g*) In accordance with the design of this provision, it is now further enacted that no alleged lunatic may be detained in any workhouse more than fourteen days, unless under certificate from the medical officer that he is a proper person to be so kept. (25 & 26 Vict. c. 111, s. 20.)

have knowledge (by notice from the medical officer or otherwise) that any pauper resident in such parish is deemed to be a lunatic, is to give notice thereof to some justice of the county, who shall thereupon make an order for the pauper to be brought before him or some other justice of such county; and the justice before whom the pauper shall be brought shall call to his assistance a physician, surgeon, or apothecary; and if upon examination of the pauper such medical man signs a certificate, to the effect that the pauper is a lunatic and a proper person to be taken charge of,—the justice, if satisfied, upon view or other proof, that such is the fact, shall make an order, directing the pauper to be received into the asylum of that county (*h*); or, under special circumstances, into some other asylum, registered hospital, or licensed house (*i*). And it is further provided, that any justice, acting upon his own knowledge, and without any notice as above, may examine any pauper deemed to be a lunatic, at his own abode or elsewhere; and, after such examination, shall proceed in all respects as if the pauper had been brought before him in pursuance of an order made for that purpose (*k*). And also, that if a pauper deemed to be a lunatic cannot, on account of his health or other cause, be conveniently taken before any *justice* for examination, he may be examined at his own abode or elsewhere by some clergyman officiating in the parish, in company with the relieving officer (or overseer): and, in such cases, the order for his reception into an asylum may be made, con-

(*h*) 16 & 17 Vict. c. 97, s. 67. As to the form of the certificate and order thereon (which are provided by the statutes), see sects. 67, 72; 25 & 26 Vict. c. 111, ss. 19—28.

(*i*) 16 & 17 Vict. c. 97, s. 67. The superintendent of every hospital into which lunatics are received must apply to the commissioners of lunacy (as to whom vide post, p. 118) to have such hospital *registered* (8 & 9 Vict. c. 100, s. 43); and houses for the reception of lunatics must also be *licensed* either by the commissioners, or if not within their immediate jurisdiction then by the justices in general or quarter sessions (sects. 14—17).

(*k*) 16 & 17 Vict. c. 97, s. 67.

jointly, by such clergyman and relieving officer or overseer (*l*). And also that where a certificate of lunacy is signed by the medical officer of the parish or union wherein the pauper is resident, and also by some other medical man called in as aforesaid,—such joint certificate shall be received by the justice, (or by the clergyman and relieving officer or overseer,) as conclusive evidence of the fact of lunacy, and he or they shall make an order for the reception of the pauper accordingly (*m*).

It is not, however, to the lunatic paupers, only, of the county, that admission into the asylum is allowed. Hither may be sent any lunatic (whether resident in the county or not) who, on examination by two justices, (assisted by a medical man,) is found to be *meditating* crime (*n*). An order for admission may moreover be made in respect of any person found in the county, who (whether a pauper or not) is wandering at large; or not under proper care or control; or is cruelly treated or neglected by the persons having the care of him (*o*); and where the asylum is more than sufficient for the accommodation of cases within the county, it is competent to the visitors to allow the admission of the pauper lunatics of any other county; or (if the visitors think fit) of lunatics who are not paupers (*p*). In the latter case, the visitors are at liberty to prescribe as the condition of admission, that the person by whom it shall be applied for shall give an undertaking for the due payment of the charge to be made for providing lodging, maintenance, and other necessaries for the lunatic; as to which it is provided, that a lunatic not being a pauper shall have the same accommodation in all respects as the pauper lunatics (*q*). In conclusion we may observe that in every case of the reception of a pauper lunatic, he shall

(*l*) 16 & 17 Vict. c. 97, s. 67.
(*m*) Ibid.
(*n*) 1 & 2 Vict. c. 14. As to the asylum for lunatics who have *already* committed crime, vide post, p. 117.
(*o*) 16 & 17 Vict. c. 97, s. 68.
(*p*) Sect. 43.
(*q*) Ibid.

be chargeable to the parish from which he is sent, or to any other parish to which he can be shown to belong; or if it appears that his settlement cannot be ascertained, then to the county at large in which he was found (*s*).

II. With regard to criminal lunatics, it is enacted by 3 & 4 Vict. c. 54 (amended by 27 & 28 Vict. c. 29), that if any person while in prison or other confinement under sentence of transportation, penal servitude, or imprisonment, or under a charge of any offence, or for failing to find bail, or in consequence of a summary conviction or order on other than civil process, shall appear to be insane, two or more of the visiting justices, or, failing them, two justices of the place where such prisoner is confined, shall, with the assistance of two physicians or surgeons by them selected, inquire into the alleged insanity, and if they shall certify the same, a secretary of state may order such person to be removed to any proper receptacle for insane persons (*t*); and if at any time it shall be made to appear to a secretary of state that there is good reason to believe (either from a certificate to that effect by the visiting justices or by other means whatsoever) that a prisoner in confinement *under sentence of death* is insane, he shall direct an inquiry by two or more physicians or surgeons, and, on their certificate, shall direct his removal to such a receptacle. And in all cases of removal the lunatic shall be kept in such receptacle till he is in like manner certified to be sane, when he is to be remitted to his former place of confinement, there to undergo the punishment to which he was sentenced. The proper

(*s*) 16 & 17 Vict. c. 97, ss. 95—98, 102. (See Knowles *v.* Trafford, 7 Ell. & Bl. 152; Leeds *v.* Wakefield, ibid. 258.) If the parish be in a *union* the expense in regard to such pauper lunatic falls upon the "common fund." (See 24 & 25 Vict. c. 55, ss. 6, 7; 27 & 28 Vict. c. 29, s. 5; The Queen *v.* Heaton, 1 E. & E. 782; The Queen *v.* Cheddingstone, 2 B. & Smith, 294; All Saints, Poplar *v.* Middlesex, 2 E. & E. 829; The Queen *v.* Medway Union, Law Rep., 3 Q. B. 383.)

(*t*) As to the costs of maintaining a prisoner so removed, see Bradford Union *v.* Wilts, Law Rep., 3 Q. B. 604.

receptacle for persons removable under the above provisions is one appropriated, under recent statutes, as an asylum for the custody and care of such criminals as shall become insane during their imprisonment, or of such persons as shall be acquitted at their trial on the ground of insanity under the 39 & 40 Geo. III. c. 94, to which reference will be made in a future place (*u*). For by 23 & 24 Vict. c. 75 (amended by 30 Vict. c. 12, and 32 & 33 Vict. c. 78), it is enacted that her majesty may, from time to time, by warrant under her royal sign manual, appoint that any asylum or place in England which has been provided for the purpose, shall be an *asylum for criminal lunatics;* and that the secretary of state may from time to time appoint any three or more persons to be a council of supervision thereof, and also a resident medical superintendent, chaplain, and such other officers and servants as he shall think necessary, and frame such rules for its guidance and management as may be required (*x*). He is also enabled to discharge any criminal therein confined, either absolutely or on conditions; and, if any condition be broken, to cause him to be recaptured (*y*). Moreover, he may permit any criminal lunatic to be absent on trial from his place of confinement on such conditions as he may think fit; and proper provisions are made in the Acts for the contingency of the term of punishment awarded to any criminal, who shall become lunatic, expiring before he recovers the use of his reason, and for keeping him in security till that event shall happen (*z*).

III. The provisions which have been made to secure the proper treatment of lunatics, wherever confined, may be summarily stated as follows.

By 8 & 9 Vict. c. 100, 16 & 17 Vict. cc. 96, 97, and 25 & 26 Vict. c. 111 (*a*), it is made a *misdemeanor* for

(*u*) Vide post, vol. IV. p. 26.
(*x*) 23 & 24 Vict. c. 75, s. 2.
(*y*) 30 Vict. c. 12, s. 5.
(*z*) Sect. 6.
(*a*) This group of statutes are for some purposes included in the

any person to receive two or more lunatics into any house, unless it is an asylum (*b*), or a hospital duly registered, or a house duly licensed under the provisions of some act of parliament for the reception of lunatics (*c*). And, as the general rule, no person can be legally received in a *hospital*, or *licensed house*, without a written order from the person sending him, and medical certificates of two physicians, surgeons or apothecaries, in such form as prescribed by the Acts (*d*). But in the case of a *pauper* lunatic, the order is to be under the hand of a justice of the peace, or the officiating clergyman and one of the overseers or the relieving officer of the parish to which he belongs; and the medical certificate is to be signed by one physician, surgeon or apothecary (*e*). Hospitals wherein lunatics may be received, must be registered under the sanction of the commissioners of lunacy (a board of persons comprising medical men and barristers, established by 8 & 9 Vict. c. 100, s. 3); and *licences* for keeping houses for such purpose, are granted by the same commissioners (for any period not exceeding at one time thirteen calendar months), in Middlesex, London, Westminster, Southwark, and all places within the range of seven miles from any part of London, Westminster, or Southwark, at a quarterly or special meeting of the Board: and, in other places, are granted by the justices for the county,—in general or quarter sessions assembled (*f*). And many provisions are

term "Lunacy Acts." (See 25 & 26 Vict. c. 111, s. 1.)

(*b*) That is to say, a county (or borough) lunatic asylum, duly established and maintained under the provisions of some Act of Parliament. (See 8 & 9 Vict. c. 100, s. 114.)

(*c*) 8 & 9 Vict. c. 100, s. 44. As to receiving *one* lunatic into an unlicensed house, see sect. 90; 16 & 17 Vict. c. 96, s. 8.

(*d*) Sect. 4. See Fletcher *v.* Fletcher, 1 E. & E. 420.

(*e*) Sect. 7. As to the formalities to be observed with respect to a *pauper* lunatic sent to the county (or borough) asylum, vide sup. p. 113.

(*f*) 8 & 9 Vict. c. 100, ss. 14—17. But before a licence can be granted by the justices, the house must be inspected by the Commissioners of Lunacy. (25 & 26 Vict. c. 111, s. 14.)

made in the above Acts, of a kind too minute and specific to be here detailed, for the effectual superintendence of all such registered hospitals and licensed houses, — among which are comprised, *inter alia*, enactments, that their keepers shall always report the admission, death, removal, discharge, or escape of any patient (*g*); that they shall be provided with proper medical attendance (*h*); that they shall be frequently visited and inspected by the commissioners, and, (in the case of houses in the country,) by visitors appointed by the magistrates at quarter sessions (*i*); that these visits shall be at uncertain and unexpected intervals, and in certain cases even by night (*k*); and that reports shall be made by the visitors to the commissioners, and by the commissioners to the lord chancellor, in March in every year, of the state of the several houses visited by them, and as to the care taken of the patients therein (*l*). Moreover, any person detained in a licensed house or hospital without sufficient cause established to the satisfaction of the commissioners, may be directed by them to be set at liberty (*m*). But their power to order a discharge does not extend to the case of a person found lunatic under a *commission* (*n*), or confined by order of the secretary of state for the home department, or under the order of any court of criminal jurisdiction (*o*). In addition to the visitations thus established in regard to *registered hospitals* and *licensed houses*, the commissioners are moreover directed to visit all *asylums* and *gaols* and *workhouses* where any lunatics may be confined, and inquire into their condition, system,

(*g*) 8 & 9 Vict. c. 100, ss. 53, 54, 55; and see 25 & 26 Vict. c. 111, s. 44.

(*h*) 8 & 9 Vict. c. 100, ss. 57, 58, 59.

(*i*) Sects. 61, 62; 25 & 26 Vict. c. 111, s. 29.

(*k*) 8 & 9 Vict. c. 100, s. 71.

(*l*) Sect. 88; 16 & 17 Vict. c. 96, s. 32.

(*m*) 8 & 9 Vict. c. 100, ss. 76—81.

(*n*) Vide sup. vol. II. pp. 511, 512.

(*o*) 16 & 17 Vict. c. 96, s. 38.

and regulations (*p*). Authority is also given by these Acts to the lord chancellor, (in the case of any lunatic under the care of a committee,) and to the lord chancellor or the secretary of state for the home department, (in the case of any lunatic or person under any restraint as a lunatic,) to direct a commissioner or some other person to visit the supposed lunatic, and to make report to him upon the matters into which he shall be directed by such order to inquire (*q*).

(*p*) 8 & 9 Vict. c. 100, s. 110. In the case of workhouses, they are to make a report to the Local Government Board (16 & 17 Vict. c. 96, s. 28; 34 & 35 Vict. c. 70.)

(*q*) 8 & 9 Vict. c. 100, s. 112. See also 16 & 17 Vict. c. 70, ss. 2, 106.

CHAPTER VI.

OF THE LAWS RELATING TO PRISONS.

ANOTHER subject on which much attention has been repeatedly bestowed by the legislature, is that of gaols or prisons (*a*).

It is a principle of law, founded on a due regard to the public liberty and welfare, that a gaol can be erected only by the authority of parliament (*b*): and the same policy has also established the doctrine that when once erected it belongs to the sovereign (*c*); thereby placing it under the general control and protection of the same executive power from which emanates, in contemplation of law, the whole administration of civil and criminal justice.

The gaoler of a prison was formerly, in contemplation of law, the deputy only of the sheriff of the county or place in which such prison is situate; and if he negligently suffered a prisoner to escape, the sheriff, as his principal, was held responsible. But by a modern Act (28 & 29 Vict. c. 126) every prisoner shall now be deemed to be in the legal custody of the gaoler himself (*d*), and (except with regard to prisoners under *sentence of death*,) the jurisdiction and control of the sheriff over the prison is taken away (*e*).

There is a species of prison which is termed, by way

(*a*) By 28 & 29 Vict. c. 126, the word "prison" is, for the purposes of that Act, to mean gaol, house of correction, bridewell and penitentiary (sect. 4).

(*b*) 2 Inst. 705; Bac. Abr. Gaol (A.); see R. *v.* Earl of Exeter, 6 T. R. 373; R. *v.* Justices of Lancashire, 11 Ad. & Ell. 144.

(*c*) 2 Inst. 589.

(*d*) 28 & 29 Vict. c. 126, s. 58.

(*e*) Sect. 60.

of distinction from a gaol properly so called (or common gaol), a House of Correction, or (in the city of London) a Bridewell.

These houses of correction, which were established in the reign of Elizabeth, were originally designed for the penal confinement (after conviction) of paupers refusing to work, and other persons falling under the legal description of *vagrants* (*f*). And this was at first their only application; for in other cases the common gaol of the county, city, or town in which the offence was triable, was (generally speaking), the only legal place of commitment (*g*). However, by 5 & 6 Will. IV. c. 38, ss. 3, 4, it was enacted, that a justice of the peace (or coroner) might commit, for safe custody, to any house of correction situate near the place where assizes or sessions were to be held; and that offenders sentenced in those courts might be committed, in execution of their sentence, to any house of correction for the county. And by 14 & 15 Vict. c. 55, ss. 20, 21, it was provided, that it should be lawful to commit to any approved gaol or house of correction, for trial at the next assizes for the county, any person charged with an offence triable at such assizes; it being directed, however, that every person so committed should, in due time, be removed to the common gaol, in order to take his trial (*h*). But the importance of the distinction between gaols and houses of correction is in a great measure taken away by the 28 & 29 Vict. c. 126, s. 56, which enacts that, subject to the provisions of that Act with respect to the appropriation of prisons to different classes of prisoners, every prison to which that Act applies shall be deemed to be a gaol and house of correction.

The maintenance and government of prisons is now mainly provided for by the Act just named, by which the

(*f*) See 39 Eliz. c. 4.

(*g*) 5 Hen. 4, c. 10; 23 Hen. 8, c. 2; 6 Geo. 1, c. 19.

(*h*) As to lock-up houses for the temporary confinement of persons taken into custody but not yet committed for trial, see 31 Vict. c. 22.

statute law on this subject was consolidated and amended, and which is known as the Prisons Act, 1865 (*i*). This statute requires that there shall be provided at the expense of every county, borough, or other place having a separate prison jurisdiction, adequate accommodation for its prisoners in a prison or prisons conformable to the regulations of that Act (*j*); and the duty of altering, enlarging, building or rebuilding, to attain this result, is entrusted to the several *prison authorities*,—*i. e.*, the justices at quarter or gaol sessions, the council of the borough, or otherwise, as the case may be (*k*). But the sanction of a secretary of state must be previously obtained to any such alteration of an existing prison; and he may recommend an advance for the purpose by the Public Works Loan Commissioners, to be repaid out of a local rate (*l*); and any prison authority may (with the like sanction) contract with any other prison authority for the reception and maintenance of their prisoners (*m*). The jurisdiction as to visiting these prisons is vested by the Act in the justices of the prison jurisdiction, who, in sessions assembled, are annually to nominate two or more of their number for this duty (*n*). These visiting justices are from time to time to inspect the prison, examine into the state of the buildings, the conduct of the officers, the treatment and conduct of the prisoners, the means of setting them to work, and the amount of their earnings and the expenses attending the prison (*o*). They are also, generally, to inquire into all abuses within the

(*i*) There is a subsequent statute, the 29 & 30 Vict. c. 100, but it refers only to the maintenance of prisoners removed for the purpose of trial. By 28 & 29 Vict. c. 126, the 4 Geo. 4, c. 64, and a variety of other enactments on the subject of gaols and prisons, are repealed.

(*j*) See also 5 & 6 Vict. c. 109, and 11 & 12 Vict. c. 101, as to providing *lock-up houses* for temporary confinement previous to commitment for trial, and enabling counties and boroughs to enter into agreement with each other as to erecting the same.

(*k*) 28 & 29 Vict. c. 126, s. 5.

(*l*) Sect. 29.

(*m*) Sect. 31.

(*n*) Sect. 53.

(*o*) Ibid.

prison, to take cognizance of all matters of pressing necessity, and to regulate the same so far as their commissions as justices extend; and once at the least in each quarter of the year to make their report to the justices in sessions assembled (*p*).

Careful regulations have been made in the same statute for the spiritual care of the prisoners during their incarceration. For this purpose it is enacted that there shall be appointed for each prison a chaplain and assistant chaplain (if thought necessary), being respectively clergymen of the established Church (*q*); and notice of the nomination is to be sent to the bishop of the diocese, without whose licence no nominee can officiate (*r*). There shall also be provided in every prison either a chapel or a room suitable for the purposes of a chapel, in which prayers selected from the liturgy of the established Church and portions from the Scriptures shall be daily read, either by the chaplain himself, the gaoler, or such person as shall be selected by the visiting justices (*s*); and there are also other provisions to secure the regular and due performance of divine service in the prison, and the bestowal of religious and moral instruction on such prisoners as are willing to be taught. And in order to meet the spiritual requirements of such prisoners as do not belong to the established Church, an Act was passed in 1863 (the 26 & 27 Vict. c. 79), under the provisions of which (taken in connection with the 28 & 29 Vict. c. 126, now under consideration), the prison authorities are enabled to appoint a minister of the persuasion to which such prisoners belong; and, if they see fit, to award him out of the prison rates a reasonable recompence for his services (*t*).

(*p*) 28 & 29 Vict. c. 126, s. 53. Any justice with jurisdiction in the place to which a prison belongs may also, whenever he sees fit, enter and examine into the condition of the prison, and make observations thereon in a book kept for the purpose (sect. 55).

(*q*) Sect. 10.

(*r*) Sect. 13.

(*s*) Sched. I., Nos. 44, 45.

(*t*) Sect. 47.

With respect to the particular management of the prisons, and the rules for the due discipline and care of the prisoners, the Act contains a variety of provisions with regard to their admission and discharge, their food, clothing and bedding, their personal cleanliness, their employment, health and instruction, and other matters too numerous and of too specific a character to be inserted in this place. We must content ourselves with adding, that, besides these, the justices, in sessions assembled, are enabled to frame regulations as to diet and other matters of internal economy,—though rules so issued must receive the approval of one of her majesty's principal secretaries of state before they become valid (*u*). A principal secretary of state is also empowered to appoint a sufficient number of proper persons as Inspectors for every place of imprisonment in Great Britain; who are to visit and inquire into the state of these establishments, call the attention of the visiting justices by letter to any irregularity or complaint (*x*), and report annually the results of their inquiries to the secretary of state. And these reports are afterwards laid before both houses of parliament (*y*).

Besides the prisons to which the above Act applies, there are some particular prisons which are the subject of separate and specific regulation. As—

1. *Millbank Prison*, formerly called "The Penitentiary at Millbank," is used for the temporary reception of convicts (male and female) under sentence of penal servitude (*z*). Although locally situated within their jurisdiction, the justices for Middlesex or Westminster have no authority over this prison (*a*): but it is placed under a board of three persons, appointed by a principal secretary of state,—and established as a body corporate, by the

(*u*) 28 & 29 Vict. c. 126, s. 21.
(*x*) Sect. 22.
(*y*) 5 & 6 Will. 4, c. 38, s. 7.
(*z*) As to Millbank Prison, see 6 & 7 Vict. c. 26; 11 & 12 Vict. c. 104; 13 & 14 Vict. c. 39; and 23 & 24 Vict c. 60.
(*a*) 6 & 7 Vict. c. 26, s. 8.

name of "The Directors of Convict Prisons" (*b*). These Directors are to make regulations for the government of the prison, subject to the approbation of a principal secretary of state, and to make yearly reports to such secretary, as to all matters relating to the prison or to the convicts; and these reports are to be afterwards laid before both houses of parliament (*c*). The secretary of state is also to appoint for the prison, a governor, a chaplain, a medical officer, a matron, and such other officers as may be deemed necessary (*d*). By 32 & 33 Vict. c. 95, *military* offenders may also be sent to this prison for the purpose of undergoing their sentences.

2. *Parkhurst Prison;* established for the confinement and correction of *young* offenders, male or female, as well those under sentence of penal servitude, as those under sentence of imprisonment (*e*). The rules for this prison (which is in the Isle of Wight) are to be made by one of the principal secretaries of state, and afterwards laid before parliament; and they may include the infliction of corporal punishment on all male offenders therein confined. By the same authority a governor, chaplain, surgeon, and matron, and all other necessary officers, are to be appointed. This establishment also is placed, by 13 & 14 Vict. c. 39, under the superintendence of the "Directors of Convict Prisons;" who, if they discover any abuses, are to report the same to a principal secretary of state;

(*b*) 13 & 14 Vict. c. 39. These directors also superintend, visit and report upon to parliament other places (not mentioned in the text) used for the confinement of offenders under sentence of penal servitude. The places here referred to are such as shall be appointed for the purpose by order in council. (See 5 Geo. 4, c. 84, s. 10; 13 & 14 Vict. c. 39; 16 & 17 Vict. c. 99; 20 & 21 Vict. c. 3.) The existing establishments include those at Portland, Portsmouth, Chatham, Dartmoor, Brixton, Woking, and Fulham. Of these, those at Woking and Fulham are appropriated to *invalids*, and those at Brixton and Fulham to *females*. (See the Report of the Directors of Convict Prisons, for the year 1860.)

(*c*) 6 & 7 Vict. c. 26, ss. 10, 11. And see 13 & 14 Vict. c. 39, s. 1.

(*d*) 6 & 7 Vict. c. 26, s. 5.

(*e*) See 1 & 2 Vict. c. 82; 5 & 6 Vict. c. 98, s. 12; 20 & 21 Vict. c. 3, s. 3.

and they are required, also, to make a half-yearly report as to its state and condition, which is submitted annually to parliament (*f*).

3. *Pentonville Prison;* established for the temporary confinement of male convicts under sentence of penal servitude (*g*). This also is placed by 13 & 14 Vict. c. 39, under the superintendence of "The Directors of Convict Prisons;" and power is conferred on them to hold meetings and make rules, subject to the approbation of a principal secretary of state (*h*); and, with the like approbation, to appoint officers,—comprising a governor, a chaplain, a medical officer, and such others as may be found necessary (*i*). And it is provided, that the Directors shall from time to time appoint one or more of themselves to visit the prison during the intervals between their meetings; and that they may delegate power to such visitors to make orders in cases of pressing emergency (*k*). And further, that the Directors shall annually make reports to the secretary of state as to all matters relating to the prison, its discipline and management; which reports shall afterwards be laid before both houses of parliament (*l*).

(*f*) 1 & 2 Vict. c. 82; 13 & 14 Vict. c. 39.

(*g*) See 5 & 6 Vict. c. 29, ss. 14, 16; 16 & 17 Vict. c. 99, s. 6; 20 & 21 Vict. c. 3, s. 3.

(*h*) 5 & 6 Vict. c. 29, s. 9.

(*i*) Sect. 6.

(*k*) Sect. 10.

(*l*) Sect. 13.

CHAPTER VII.

OF THE LAWS RELATING TO HIGHWAYS AND BRIDGES.

HIGHWAYS are those public roads which all the subjects of the realm have a right to use; and the term, (for some purposes at least,) also applies to ways common to the inhabitants of some particular parish or district only,—as the case of church paths (*a*). The roads now in use have in general either existed by prescription (that is, from time immemorial), or have been constructed under the authority of local acts of parliament. They may be traced, however, in some cases, to a different origin; for the owner of any land may, if he think fit, dedicate a way over it to the use of the public; and if he long permit strangers to pass over it, at their free will and pleasure, and without molestation, a dedication of this kind will be presumed (*b*).

The parish is, of common right, bound (as the general rule) to keep in repair any highway within its boundaries, whatever may be the manner in which the road first originated; but, in some cases, the liability to repair attaches (by prescription) to a particular township, or other division of a parish (*c*); and occasionally *ratione*

(*a*) See 5 & 6 Will. 4, c. 50, s. 5. A highway may exist in a place which is not a thoroughfare. (Bateman *v.* Bluck, 18 Q. B. 870.)

(*b*) As to highways by dedication, see Barraclough *v.* Johnson, 8 A. & E. 99; Poole *v.* Huskinson, 11 Mee. & W. 827; Roberts *v.* Hunt, 15 Q. B. 17; The Queen *v.* Petrie, 4 Ell. & Bl. 737; Dawes *v.* Hawkins, 8 C. B., N. S. 848; The Queen *v.* Dukinfield, 4 B. & Smith, 158; Bermondsey *v.* Brown, Law Rep., 1 Eq. Ca. 204; Mercer v. Woodgate, ib. 5 Q. B. 26; Arnold *v.* Blaker, ib. 6 Q. B. 433.

(*c*) See Queen *v.* Lordsmere, 15 Q. B. 689.

tenuræ to a private owner of land, bound to repair some particular highway in right of his estate (*d*). Where an individual is bound to repair by his ownership of the soil, he often claims (by grant or prescription), from those who use the road, a toll of that species which is called a *toll traverse* (*e*).

The case of bridges is differently provided for. The expense of maintaining these is defrayed indeed (like that of roads) by the public; this having been part of the *trinoda necessitas*, to which every man's estate was by the antient law subject, viz., *expeditio contra hostem, arcium constructio, et pontium reparatio* (*f*);—but it is incumbent, not on the parishes, but, as the general rule, on the counties at large in which the bridges are situate (*g*). And where a parish is bound by prescription, (as is sometimes the case,) to repair a bridge, there is a statutory provision, which gives effect to any contract between the county and the parish for performing the repairs in future at the expense of the former, and relieving the latter from the charge (*h*). The liability of the county extended at common law, not only to the bridge itself, but to so much of the road as passed over it, and even to so much as formed its ends or approaches,—and, indeed, by stat. 22 Hen. VIII. c. 5, the county was made liable

(*d*) 3 Geo. 4, c. 126, s. 107; 5 & 6 Will. 4, c. 50, s. 62. See R. *v.* Eastrington, 5 A. & E. 765; R. *v.* Heage, 2 Q. B. 128. See The Queen *v.* Ramsden, 1 Ell. Bl. & Ell. 949.

(*e*) Com. Dig. Toll; Willes, 115; Brett *v.* Beales, 10 B. & C. 508; Lord Middleton *v.* Lambert, 1 A. & E. 401. As to the distinction between a toll traverse and a toll *thorough*, see R. *v.* Marquis of Salisbury, 8 A. & E. 716.

(*f*) 1 Bl. Com. 357. An individual may be liable to repair a bridge *ratione tenuræ;* see Baker *v.* Greenhill, 3 Q. B. 148; Queen *v.* Bedfordshire (Inhabitants), 4 Ell. & Bl. 535.

(*g*) Viner's Abridg. Bridges (A). See Re Newport Bridge, 2 Ell. & Ell. 377. As to borrowing money on credit of the county rate, for repair of the bridges therein, see 4 & 5 Vict. c. 49. As to the manner of providing for the repair of bridges, in cases where a *borough* and not the county is liable, see 13 & 14 Vict. c. 64.

(*h*) 22 Hen. 8, c. 5. (See R. *v.* Hendon, 4 B. & Ad. 628.)

to repair three hundred feet either way from the bridge. And such is still the state of the law as to all bridges built prior to the passing of the Highway Act (5 & 6 Will. IV. c. 50,) in the year 1835. But by that statute it is provided, that, in the case of all bridges thereafter to be built, the repair of the road itself passing over or adjoining to the bridge shall be done by the parish, or other parties bound to the general repair of the highway of which it forms a portion;—the county being still subject, however, to its former obligation, as regards "the "walls, banks, or fences of the raised causeways, and "raised approaches to any bridge, or the land arches "thereof" (*i*).

The same statute contains provisions, designed to protect parishes from being subjected to unreasonable charges, in respect of ways dedicated to the public. It enacts, that no road made at the expense of any individual, or body corporate, shall be deemed a highway which the parish is liable to repair, unless three calendar months' notice shall be given to the parish surveyor, of an intention to dedicate such road to the public (*k*). Upon notice being so given, a vestry is to be called to consider whether the road is of sufficient utility to justify its being kept in repair by the parish; and in the event of the vestry thinking the road unnecessary, the justices, at the next special sessions for the highways, are finally to determine the matter (*l*). Other provisions are added, the object of which is to ensure that the road shall be originally constructed in a proper and substantial manner, before the expense of repairing it is cast upon the parish (*m*).

(*i*) 5 & 6 Will. 4, c. 50, s. 21.

(*k*) Sect. 23. As to the liability of the parish before this statute, see R. *v.* Leake, 5 B. & Ad. 469.

(*l*) As to the discontinuance of the repair of unnecessary highways in places which have adopted the Highway Acts of 1862, 1864 (vide post, p. 132), see 27 & 28 Vict. c. 101, s. 21.

(*m*) 5 & 6 Will. 4, c. 50, s. 23. See The Queen *v.* Thomas, 7 Ell. & Bl. 399.

Any parish, county, or other party bound to repair a road or bridge, and neglecting the duty, is liable at common law to an indictment (*n*).

Though each parish (or township or other particular district or person) through whose lands any portion of a highway passes, is liable to maintain such portion by the general law of the land,—there are also other means to provide funds for repairing the most frequented and important roads. For these are kept in order, (and many of them were originally constructed,) under the authority of local acts of parliament, called *Turnpike Acts:* by which the management of such roads is usually vested, for a certain term of years, in trustees or commissioners; who are empowered by these Acts to erect toll-gates, and to levy tolls from those who pass through, as a fund for defraying the expenses of repairs or improvements. There is thus a distinction between *highways in general* and *turnpike roads.* It is to be understood, however, with respect to the latter, that the collection of toll does not supersede the other means provided by law for maintaining highways. If a turnpike road or bridge is allowed by the trustees to fall out of repair, the parishes or other parties who would have been bound to make it good (supposing it not to have become the subject of a turnpike trust) are still, in general, liable to that obligation (*o*). But they may be exempt from it under particular circumstances; for the trustees of a turnpike road may, in certain cases, enter into a contract with such parties, and undertake to

(*n*) As to the costs of such indictment, see Reg. *v.* Inhabitants of Heanor, 6 Q. B. 745; The Queen *v.* Eyton, 3 Ell. & Bl. 390: and as to its removal by *certiorari* to the Queen's Bench, see R. *v.* Inhabitants of Sandon, 3 Ell. & Bl. 390.

(*o*) See 3 Geo. 4, c. 126, s. 110; 7 & 8 Geo. 4, c. 24, s. 17; R. *v.* Netherthong, 2 B. & A. 179; Bussey *v.* Storey, 4 B. & Adol. 109. It may be observed, that on any turnpike road becoming an ordinary highway (the trust having determined) the trustees or commissioners are required, by 30 & 31 Vict. c. 121, s. 3, to pay over any balance of monies in their hands rateably among the parishes who are bound to repair the road.

repair exclusively out of the trust funds: and where any contract of this description is in force, the persons originally liable are discharged from all responsibility (*p*). The turnpike trusts which have been thus established are very numerous; but there is one, which, from its importance. deserves a specific notice. It is that of the "turnpike roads of the metropolis north of the Thames;" the different trusts of which were consolidated into one by 7 Geo. IV. c. cxlii,—a statute which has been amended by 10 Geo. IV. c. 59, and 26 & 27 Vict. c. 78 (*q*).

With respect to those highways, or parts of highways, which pass through and form the streets of towns, we may observe that they are generally the subject of distinct provision, under special local statutes, usually called *Paving Acts* (*r*). In 10 & 11 Vict. c. 34, a consolidation will be found of the provisions ordinarily introduced into Acts of this description.

Having thus taken some view of the general state of the law on the subject of the present chapter, we propose now to take some notice of certain particular provisions applicable, I. To highways in general. II. To turnpike roads.

I. *Highways in general.*—Some of these are regulated by 5 & 6 Will. IV. c. 50, 4 & 5 Vict. cc. 51, 59, and 8 & 9 Vict. c. 71,—and others under the provisions of more recent Acts, viz., 25 & 26 Vict. c. 61, 26 & 27 Vict.

(*p*) See 3 Geo. 4, c. 126, ss. 106, 107, 108.

(*q*) By this last Act a considerable number of roads, formerly maintainable by the commissioners under these trusts, are converted into *parish highways* and made no longer subject to turnpikes.

(*r*) As to the Acts for paving, lighting, &c., in boroughs, see 20 & 21 Vict. c. 50, ss. 2—4. As to the enactments in regard to streets and highways passing through districts which have adopted the Local Government Act, 1858, (21 & 22 Vict. c. 98,) see 11 & 12 Vict. c. 63, s. 70; 21 & 22 Vict. c. 98, ss. 36—43; 24 & 25 Vict. c. 61, s. 9; 25 & 26 Vict. c. 61, s. 7. And as to the streets of the *metropolis*, see 57 Geo. 3, c. cxxix; 25 & 26 Vict. c. 61, s. 7; c. 102, s. 73 et seq.; 30 & 31 Vict. cc. 5, 134.

c. 61, and 27 & 28 Vict. c. 101. We will first consider the provisions of the former group of statutes (*s*).

The general plan of the 5 & 6 Will. IV. c. 50, and the Acts by which it is amended, is to place highways under the care of *surveyors*, appointed for the respective parishes, (subject to a superintending power to be exercised, in certain cases, by the justices of the peace at special sessions to be holden for the highways;) and to provide for the expenses of repairing them by a rate on the occupiers of land, made and levied by the surveyor, upon the same principle (generally) as the poor rate (*t*). Such surveyor is to be elected annually, by the inhabitants in vestry assembled; and he must possess certain qualifications in point of property (*u*). When elected, he is compellable—unless he can show some grounds of exemption (*x*)—to take upon himself the office; but he is permitted to appoint a deputy, who is subject to the same responsibilities with his principal (*y*). The office, as the general rule, is not remunerated, but the vestry may appoint a surveyor, if they think proper, with a salary (*z*). Any two or more parishes may,—by mutual agreement and by consent of the justices in sessions assembled,—be united into one district, for the purposes of the Act, under

(*s*) The 5 & 6 Will. 4, c. 50, applies to all highways not otherwise provided for. But roads, pavements, bridges and turnpike roads falling under local or personal acts of parliament, are not affected by it. As to the highways of *South Wales*, they are especially regulated by 23 & 24 Vict. c. 68 (repealing 14 & 15 Vict. c. 16); but, in all points not otherwise provided for therein, are within the 5 & 6 Will. 4, c. 50. (And see 25 & 26 Vict. c. 61, s. 7.)

(*t*) 5 & 6 Will. 4, c. 50, ss. 27, 113. (See Reg. *v.* Randall, 4 Ell. & Bl. 564.) As to the recovery of the costs of distraining for highway rates, and the course of proceeding on such distress, see 12 & 13 Vict. c. 14.

(*u*) 5 & 6 Will. 4, c. 50, s. 6. As to the election and appointment of surveyor, see R. *v.* Best, 2 N. S. C. 655; Reg. *v.* Justices of Surrey, 5 D. & L. 40.

(*x*) The same grounds of exemption that apply to an overseer of the poor (vide sup. p. 43, n. (*o*)) hold also as to a surveyor of the roads.

(*y*) 5 & 6 Will. 4, c. 50, ss. 7, 8.

(*z*) Sect. 9.

the superintendence of a *district surveyor* (*c*). This officer, however, is to have no authority to make or levy the rate; but each parish must elect its own separate surveyor for that purpose (*d*). On the other hand, in large parishes, the duties of the office of surveyor may be committed to more than one person. For where a parish has a population of more than five thousand, a board of surveyors may be appointed, to be called the "Board for repair of the highways" in that parish; and such board is authorized to appoint paid officers, viz. collectors, an assistant surveyor, a clerk, and a treasurer (*e*).

The principal duty of the surveyor is to keep the parish highways in repair (*f*). Where any of them is found out of order, complaint may be made to any justice of the peace, (on the oath of one witness,) who may grant a summons thereon: but the charge is to be heard before the justices at special sessions for the highways: and if those justices—either on their own view, or on the report of an inspector to be appointed by them for the purpose, —find that the highway is not in thorough and effectual repair, they may convict the surveyor in a penalty not exceeding 5*l.*, and order him to repair within a limited time; and if such order be not complied with, he incurs the further forfeiture of such sum as shall be judged adequate to the probable expense of the repairs required; and the money is to be applied accordingly to that purpose (*g*). The same course of proceeding, *mutatis mutandis*, is applicable to the case where an owner is chargeable *ratione tenuræ*, — and if the highway is part of a turnpike road, the justices are to summon the treasurer, surveyor or other officer of the trust, and to make such order upon him as is already stated with regard to the

(*c*) 5 & 6 Will. 4, c. 50, ss. 13—15; R. *v.* King's Newton, 1 B. & Adol. 826.

(*d*) Sects. 16, 17; R. *v.* Bush, 9 Ad. & E. 820.

(*e*) Sect. 18. See Adams, app. *v.* Lakeman, resp., 1 Ell. Bl. & Ell. 615.

(*f*) Sect. 6.

(*g*) Sect. 94.

parish surveyor (*h*). They have however no power to make an order, in any case where the obligation of repairing comes into question (*i*). The only remedy, where that occurs, is by indictment; and this is to be preferred by order of the justices against the parish or party charged before them, at the next assizes or quarter sessions for the county or place where the highway is situate (*k*).

Any injury whatever done to a highway, by which it is rendered less commodious to the passengers, is a public nuisance, and an indictable offence at common law (*l*); and any person is at liberty to abate the nuisance by removing the thing by which it is caused (*m*). But the surveyor is specially required to remove all obstructions and encroachments on the highways (*n*), and to impound cattle found straying thereon (*o*); and any person who commits certain particular nuisances—or (in general) who does any injury to a highway, or obstructs the free passage thereof,—incurs a penalty not exceeding 40*s*. (*p*).

By the common law, the course of an antient highway could not be changed without licence from the crown, to be obtained after suing out a writ of *ad quod damnum*, and the finding of an inquisition thereon, that the alteration would not be prejudicial to the public (*q*). But by the 5 & 6 Will. IV. c. 50, any two justices of the

(*h*) 5 & 6 Will. 4, c. 50, s. 94.

(*i*) Ibid.

(*k*) Sect. 95. See The Queen v. Arnold, 8 Ell. & Bl. 550; The Queen v. Haslemere, 3 B. & Smith, 313.

(*l*) By 24 & 25 Vict. c. 70, and by 28 & 29 Vict. c. 83 (continued by 36 & 37 Vict. c. 75), the use of *locomotives* on roads is allowed under certain regulations. But it is provided, that whosoever shall use them so as to cause a *public or private nuisance*, shall be liable, nevertheless, for such injury.

(*m*) 1 Hawk. P. C. c. 76, ss. 48, 61; Marriott v. Stanley, 1 M. & Gr. 568; Brook v. Jenney, 1 Gale & D. 567.

(*n*) See 27 & 28 Vict. c. 101, s. 51.

(*o*) See 5 & 6 Will. 4, c. 50, ss. 64—69; 27 & 28 Vict. c. 101, s. 25; Keane v. Reynolds, 2 Ell. & Bl. 748.

(*p*) 5 & 6 Will. 4, c. 50, s. 72; 27 & 28 Vict. c. 101, s. 25. See Queen v. Pratt, Law Rep., 3 Q. B. 64.

(*q*) 1 Hawk. P. C. c. 76, s. 35; Fowler v. Sanders, Cr. Jac. 446.

division were enabled (subject to certain conditions and restrictions) to order any highway to be widened or enlarged (*r*). The inhabitants in vestry assembled may also direct the surveyor to apply to two justices of the division, to examine a highway with a view to its being diverted or stopped up; and if a certificate of the justices in favour of such proceeding is sent to the quarter sessions, the justices there assembled are to make the order accordingly (*s*). But, in case of a diversion, the proceeding must be by consent of the owner of the lands through which the new highway is to pass (*t*). And in either case, any person who may think himself aggrieved by the proceeding may appeal from the certificate of the justices to the quarter sessions, before the order of that court is made (*u*); and the propriety of the stoppage or diversion is then to be determined by a jury (*x*).

The system of highway regulation and repair above explained not being found to work in all places in a satisfactory manner, the other highway Acts above referred to, (viz., the 25 & 26 Vict. c. 61, the 26 & 27 Vict. c. 61, and the 27 & 28 Vict. c. 101,) have now been passed; and these, without disturbing generally the operation of the Highway Act of 1835, establish a fresh plan which any particular county is at liberty to adopt. By these statutes the justices of any county, in sessions assembled, are empowered to form it (or any part of it) into a *highway district*, governed by a *highway board* (*y*); and in such

(*r*) 5 & 6 Will. 4, c. 50, s. 82.

(*s*) Sects. 84, 91.

(*t*) Sect. 85; see The Queen *v.* Justices of Worcestershire, 3 Ell. & Bl. 477; The Queen *v.* Phillips, Law Rep., 1 Q. B. 648.

(*u*) Sect. 88; see Selwood *v.* Mount, 1 Q. B. 726; The Queen *v.* Justices of Lancashire, 8 Ell. & Bl. 563.

(*x*) Sect. 89.

(*y*) 25 & 26 Vict. c. 61, ss. 5—9. More districts than *one*, may be formed in a county, or in any part of it. (Sect. 5, Schedule A.) But in order to establish any highway district, a *provisional* order is to issue in the first instance, which must be afterwards confirmed at a subsequent sessions. (Sects. 5, 6.)

board will vest all the property, liabilities, and (in general) all the powers which previously belonged to any surveyor of any parish, which lies within such district (*z*). This highway board is to consist of *waywardens* (*a*),—who are to be annually elected in the same manner, and subject to the same qualification, as surveyors of the highways, from the several parishes within the district (*b*),—together with the *justices* acting for the county, and residing within the district (*c*). And the duties, powers and liabilities of such highway board (who may appoint a treasurer, clerk, district surveyor and paid collectors) may be stated, generally, to be the same as those thrown by the 5 & 6 Will. IV. c. 50, upon surveyors of the highways (*d*). And a mode of proceeding is given by the new Acts to compel a highway board to perform its duties, analogous to that already mentioned in reference to such surveyors (*e*). And with regard to the expenses incurred by the board, certain of these are authorized to be charged upon a *district fund*, to which the several parishes forming the district are to contribute; but the other expenses, and, in particular, the expenses of maintaining and keeping in repair its own highways, are a separate charge on each parish (*f*); and the sum required is to be raised and paid over to the treasurer of the board by the overseers, out of the poor rates (*g*).

(*z*) 25 & 26 Vict. c. 61, s. 11.

(*a*) By 26 & 27 Vict. c. 61, no waywarden is to contract for work within his own district.

(*b*) Secta. 9, 10. See The Queen *v.* Lindsey, Law Rep., 1 Q. B. 68; The Queen *v.* Cooper, Law Rep., 5 Q. B. 457.

(*c*) Sect. 9. See 27 & 28 Vict. c. 101, s. 20. As to the appointment of paid collectors, ibid. ss. 31, 45.

(*d*) 25 & 26 Vict. c. 61, s. 17. See, however, certain exceptions, sect. 42. The course of proceeding at highway boards is pointed out in the first schedule to 27 & 28 Vict. c. 101.

(*e*) 25 & 26 Vict. c. 61, ss. 18, 19. Vide sup. pp. 134—136.

(*f*) 25 & 26 Vict. c. 61, s. 20. (See The Queen *v.* Farrer, Law Rep., 1 Q. B. 558.) Any waywarden or ratepayer of a parish charged with such repair may appeal to sessions (sect. 26). And see 27 & 28 Vict. c. 101, ss. 33, 37, 38.

(*g*) No contribution, however, is to be required from any parish, at

II. *Turnpike roads.*—These do not in general fall within the operation of the statutes relative to highways (*h*); but are regulated, primarily, by the local Acts relative to each particular road,—which (being temporary in their character) are, where such course is advisable, continued by the legislature from time to time as they are about to expire (*i*):—and, in the next place, by statutes of a general description, applicable (with very few exceptions) to all turnpike roads);—that is, all roads maintained by tolls and placed under the management of trustees or commissioners for a limited period of time (*k*). Of these general turnpike Acts, the 3 Geo. IV. c. 126, is the principal (*l*).

The general effect of their leading provisions is as follows:—

Every trustee or commissioner of a turnpike road must possess a certain qualification in point of property (*m*);—must make a declaration that he will duly execute his duties (*n*); and is prohibited in general from holding any profitable office or contract under the Act of which he is trustee (*o*). The justices of the peace of the different coun-

any one time, in excess of 10*d.* in the pound, or in the aggregate in any one year in excess of 2*s.* 6*d.* in the pound, except with consent of four-fifths of the ratepayers. And if, for a period of seven years prior to the Act, there has been a highway rate levied in any parish in respect of property not subject to be assessed to poor rates, such property is still so to be assessed; but in this case, the monies are to be raised and paid by the waywarden of the parish, and not the overseers (25 & 26 Vict. c. 61, s. 21).

(*h*) See 5 & 6 Will. 4, c. 50, s. 113; 25 & 26 Vict. c. 61, s. 7.

(*i*) 36 & 37 Vict. c. 90, is the continuing Act for the year 1873.

(*k*) See 4 Geo. 4, c. 95, s. 90; 3 Chitty's Burn, 177.

(*l*) Enactments with regard to the regulation of turnpike roads are also contained in the following statutes:—4 Geo. 4, cc. 16, 95; 5 Geo. 4, c. 69; 7 & 8 Geo. 4, c. 24; 9 Geo. 4, c. 77; 1 & 2 Will. 4, c. 25; 2 & 3 Will. 4, c. 124; 3 & 4 Will. 4, c. 80; 4 & 5 Will. 4, c. 81; 5 & 6 Will. 4, c. 18; 2 & 3 Vict. c. 46; 3 & 4 Vict. c. 39; 4 & 5 Vict. cc. 33, 51; 12 & 13 Vict. c. 46; 14 & 15 Vict. c. 38. See as to the turnpike roads in *South Wales*, 7 & 8 Vict. c. 91; 8 & 9 Vict. c. 61; and 10 & 11 Vict. c. 72. See, also, the Acts cited post, p. 141, n. (*s*).

(*m*) 3 Geo. 4, c. 126, s. 62.

(*n*) 4 Geo. 4, c. 95, s. 32; 31 & 32 Vict. c. 72, s. 12.

(*o*) 3 Geo. 4, c. 126, s. 65. But see 30 & 31 Vict. c. 121, s. 2.

ties or divisions through which the road passes are, *ex officio*, commissioners of the trust (*p*).

The trustees are not only to maintain and keep in repair roads committed to their management; but to construct and maintain causeways at the sides of them for the use of foot passengers (*q*); to place milestones (*r*); and to widen, divert, or improve the roads as they shall think proper. And, for the latter purpose, they are empowered to purchase land; and, (subject to certain conditions and restrictions,) to turn the road over the property of individuals (*s*), and to take materials from the lands of private owners (*t*). To facilitate the performance of the duty relative to repairs, they are also empowered, (if they think proper,) to contract, by the year or otherwise, with any person for repairing or amending the road, or any bridges or buildings thereon (*u*).

The trustees are also bound to prevent or remove all nuisances and annoyances on the roads under their management (*x*); and they may direct prosecutions by indictment, or otherwise, for offences in respect of the same (*y*).

To meet the expenses incurred, the trustees are to erect toll-gates (*z*); and the tolls are to be taken every day, the computation of them being from twelve at night to twelve the night following (*a*). They are to put up at every toll-gate a table of tolls, and to provide toll tickets to acknowledge the receipt (*b*). No person, unless specially exempted, may pass without paying (*c*): and

(*p*) 3 Geo. 4, c. 126, s. 61.

(*q*) Sects. 111, 112, 113. See Loveridge *v.* Hodsoll, 2 B. & Adol. 602; R. *v.* Higgins, 5 B. & Adol. 555; Merivale *v.* Exeter Road Trustees, Law Rep., 3 Q. B. 149.

(*r*) Sect. 119.

(*s*) 9 Geo. 4, c. 77, s. 9; 4 Geo. 4, c. 95, s. 65; 3 Geo. 4, c. 126, s. 84.

(*t*) 3 Geo. 4, c. 126, s. 97.

(*u*) 4 Geo. 4, c. 95, s. 78.

(*x*) See as to *steam engines*, 5 & 6 Will. 4, c. 50, s. 70; 27 & 28 Vict. c. 75, s. 1.

(*y*) 3 Geo. 4, c. 126, s. 133.

(*z*) 9 Geo. 4, c. 77, s. 5.

(*a*) Sect. 6.

(*b*) 3 Geo. 4, c. 126, s. 87; 4 Geo. 4, c. 95, s. 28.

(*c*) As to 3 Geo. 4, c. 126, ss. 41, 139, see R. *v.* Irving, 12 Q. B. 429.

if a passenger refuses to pay, the collector may seize and distrain his beast or carriage, or any other of his goods and chattels; and, in default of payment for four days, may sell the distress (*d*). If any dispute arises about the amount of the toll due, or the charges of a distress, it may be settled by any justice of the peace acting for the place where the toll-gate is situate (*e*). Of the various cases of exemption from tolls, mentioned in the Acts, we shall only notice the following:—No toll is to be taken on horses or carriages in attendance on her Majesty (*f*), or on any of the royal family, or returning from such duty (*g*): nor from officers or soldiers in uniform (*h*); nor from volunteers on duty and in uniform (*i*); nor on carriages carrying, or returning from carrying, commissariat stores (*k*) or materials for turnpike roads or highways; nor (in general) on those employed in the conveyance of manure, or of implements of industry (*l*), or of produce grown on the land of the owner, and not sold or going to be sold (*m*). An exemption is also in

(*d*) 3 Geo. 4, c. 126, s. 39.

(*e*) Sect. 40. As to toll collectors, and the mode of proceeding against them in case of misconduct, see sect. 52; 4 Geo. 4, c. 95, ss. 30, 50; R. *v.* Hants (Justices), 1 B. & Adol. 84, 654.

(*f*) Independently indeed of the Acts, and in virtue of the prerogative of the crown, her majesty's horses and carriages seem exempt (though not in attendance on her) if used by her permission. See Westover *v.* Perkins, 2 E. & E. 57.

(*g*) 3 Geo. 4, c. 126, s. 32; 4 Geo. 3, c. 95, s. 24.

(*h*) See 5 & 6 Vict. c. 12, s. 62, (a provision re-enacted in the Annual Mutiny Acts of later dates); and as to the exemption of the *police*, see 2 & 3 Vict. c. 47, s. 10; 3 & 4 Vict. c. 88, s. 1; 14 & 15 Vict. c. 38, s. 4.

(*i*) 24 & 25 Vict. c. 126. As to this exemption in regard to the *yeomanry*, see Humphrey *v.* Bethel, Law Rep., 1 C. P. 215; see also Tunstall *v.* Lloyd, 1 B. & S. 95.

(*k*) 3 Geo. 4, c. 126, s. 32; London and S. W. Railway *v.* Reeves, Law Rep., 1 C. P. 580; Toomer *v.* Reeves, Law Rep., 3 C. P. 62.

(*l*) As to what these words include, see 14 & 15 Vict. c. 38, s. 4. By 13 & 14 Vict. c. 79, s. 3, the trustees may, with approval of a principal secretary of state, reduce or take off the tolls on beasts or carriages used in conveying lime for the improvement of land.

(*m*) 3 Geo. 4, c. 126, s. 32; 5 & 6 Will. 4, c. 18; 3 & 4 Vict. c. 51; 14 & 15 Vict. c. 38, s. 4; and see R. *v.* Adam, 6 M. & S. 52; Foster *v.* Tucker, Law Rep., 5 Q. B. 224.

general allowed to any person on his road to or from his proper parochial church or chapel,—or his usual place of religious worship, tolerated by law (*n*),—either on Sundays, or on any other day on which divine service is by authority ordered to be celebrated (*o*). Parishioners also are exempted in attending or returning from the funeral of persons, who die and are buried in the parish in which the turnpike road lies; as also are rectors, vicars, or curates going to, or returning from, their parochial duties (*p*); and voters going to, or returning from, the election of a member for the county in which the road is situated. And all horses or other cattle, as well as vehicles of every description, are also exempted which only cross a turnpike road, or do not pass above a hundred yards thereon (*q*). It is to be observed, however, that any person claiming or taking an exemption, by fraudulent means, is liable to be convicted in a penalty not exceeding 5*l.* (*r*). The trustees are empowered, on obtaining the previous consent in writing of a secretary of state, to borrow money, as they may think proper, on the credit of the tolls; and may mortgage them, by way of security, to the lenders (*s*).

(*n*) See Smith, app. Barnett, resp. Law Rep., 6 Q. B. 34.

(*o*) 3 Geo. 4, c. 126, ss. 32, 33; see Lewis *v.* Hammond, 2 B. & A. 206.

(*p*) See Layard *v.* Overy, Law Rep., 3 Q. B. 415; Brunskill *v.* Watson, ib. 418.

(*q*) 3 Geo. 4, c. 126, s. 32; 3 & 4 Vict. c. 33; see Gerrard *v.* Parker, 7 Ell. & Bl. 498; Veitch *v.* The Trustees of Exeter Roads, 8 Ell. & Bl. 986; Warmby *v.* Deakin, 14 C. P., N. S. 124; Stanley *v.* Mortlock, Law Rep., 5 C. P. 497.

(*r*) See 3 & 4 Vict. c. 33, s. 36.

(*s*) Sect. 81. See 12 & 13 Vict. c. 87; 13 & 14 Vict. c. 79; 17 & 18 Vict. c. 58, for provisions with respect to mortgages of turnpike tolls; and 14 & 15 Vict. c. 38; 15 & 16 Vict. c. 33; 17 & 18 Vict. c. 51; 18 & 19 Vict. c. 102; 19 & 20 Vict. c. 12; 20 & 21 Vict. c. 9; 21 & 22 Vict. c. 80; 22 & 23 Vict. c. 33; 23 & 24 Vict. cc. 70, 73; 24 & 25 Vict. c. 46, s. 2; 26 & 27 Vict. c. 98; 27 & 28 Vict. c. 79; 28 & 29 Vict. c. 91; 29 & 30 Vict. c. 92; 30 & 31 Vict. c. 66; 31 & 32 Vict. c. 66, as to arrangements for relief of insolvent turnpike trusts; 33 & 34 Vict. c. 22; 35 & 36 Vict. c. 72; and 4 & 5 Vict. c. 59 (continued by 36 & 37 Vict. c. 75), as to the application of *highway rates* to the repair of turnpike roads.

They may also let the tolls to farm for three years at a time (*t*), subject to such regulations as the Acts prescribe —may compound for them with any person or persons for a year at a time—may reduce them (by consent of creditors),—or may advance them to the full amount authorized by the particular Act (*u*).

(*t*) 3 & 4 Vict. c. 33, s. 55. See Stott *v.* Clegg, 13 C. B. (N. S.) 619.

(*u*) 4 Geo. 4, c. 95, s. 13; 3 Geo. 4, c. 126, s. 43; see R. *v.* Trustees of Bury and Stratton Roads, 4 B. & C. 361.

CHAPTER VIII.

OF THE LAWS RELATING TO NAVIGATION,—AND TO THE MERCANTILE MARINE.

In attempting to exhibit, in a condensed form, the principal laws relating to the extensive subject indicated in the title to this chapter, we shall distribute our statement under the following heads:—

I. The laws relating to navigation.
II. The laws relating to the ownership, registration, and transfer of merchant ships.
III. The laws relating to merchant seamen.
IV. The laws relating to pilotage.
V. The laws relating to lighthouses, beacons, and sea marks.
VI. The laws relating to the liability of shipowners for loss or damage.
VII. The laws relating to fisheries.

I. The laws of navigation, which we shall have occasion to consider, are those which concern the united kingdom and the British possessions in general, in reference to the trading intercourse which foreign countries are allowed to hold with them.

This subject was formerly regulated by the celebrated Navigation Act passed in the reign of Charles the second. [This statute was an improvement on our earlier system, which was framed in 1650, with a narrow partial view (*a*);

(*a*) See Scobell, 132.

[being intended to mortify our own sugar islands, which were disaffected to the Parliament, and still held out for Charles the second, by stopping the gainful trade which they carried on with the Dutch (*b*); and at the same time to clip the wings of those our opulent and aspiring neighbours (*c*). This original navigation law prohibited all ships of foreign nations from trading with any English plantation without licence from the council of state. In 1651, the prohibition was extended also to the mother country: and no goods were suffered to be imported into England, or any of its dependencies, in any other than English bottoms, or in the ships of that European nation of which the merchandize imported was the genuine growth or manufacture.] At the Restoration, the former provisions were continued by the 12 Car. II. c. 18, (being the Navigation Act first above referred to,) with the material addition of requiring that the master and three-fourths of the mariners should also be British subjects, —the object of this Act, as may be gathered from its preamble, being to encourage, by the exclusion of foreign competitors, the ships, seamen, and commerce of Great Britain.

In the reign of King George the fourth both this statute and all the other navigation Acts then in force were repealed, and a new system of regulations established in their place (*d*); and this branch of the law was afterwards amended and consolidated by various Acts in the reign of King William the fourth (*e*), and of her present majesty (*f*); but none of these changes involved any departure from the policy of encouraging our mercantile marine and commerce, by prohibitions of such nature in general as above described. More recently, however, under the influence of the doctrines commonly designated as

(*b*) Mod. Univ. Hist. xii. 289.
(*c*) 1 Bl. Com. 418.
(*d*) See 6 Geo. 4, c. 105.
(*e*) See 3 & 4 Will. 4, cc. 54, 55, 59.
(*f*) See 8 & 9 Vict. cc. 88, 89, 93.

those of free trade (*g*), a new course of legislation has been pursued continually receding from that policy (*h*), until at length it has been relinquished altogether; except only as regards the trade from one part of any British possession in Asia, Africa and America, to another part of the same possession (*i*)—as to which the law still is that it shall not be carried on except in British ships (*k*): though, upon an address from the legislature of any such possession praying that the conveyance of goods or passengers may take place, as far as they are concerned, free from such restriction, her majesty is empowered to authorize it by order in council accordingly, on such terms as she may think fit (*l*) In other respects foreign vessels are now generally allowed a free commercial intercourse with this country and its dependencies, upon terms of perfect equality with our own vessels—a concession qualified, however, by some very important provisions tending to confine it to such nations as consent, on the other hand, to concede to us a reciprocal and equal freedom. For by 16 & 17 Vict. c. 107, ss. 324—326 (*m*), and by 18 & 19 Vict. c. 96, s. 15 (*n*), it is enacted, that if British

(*g*) As regards the subject now in question, these doctrines are not of merely recent application. It was held by Adam Smith, that the Act of Navigation "was not favourable "to foreign commerce, or the growth "of that opulence which can arise "from it; that a nation will be most "likely to buy cheap, when by the "most perfect freedom of trade it "encourages all nations to bring to "it the goods which it has occasion "to purchase; and for the same rea-"son it will be most likely to sell "dear, when its markets are thus "filled with the greatest number of "buyers." (Wealth of Nations, vol. 2, p. 194.)

(*h*) This legislation commenced with the statute 12 & 13 Vict. c. 29, which repealed 8 & 9 Vict. c. 88, and has since been itself repealed by 17 & 18 Vict. c. 120.

(*i*) Of the other restrictions formerly existing, those which were longest retained were such as related to the coasting trade of the United Kingdom and the Channel Islands. (See 12 & 13 Vict. c. 29; 17 & 18 Vict. c. 5; 18 & 19 Vict. c. 96, ss. 13, 14, 15.)

(*k*) See 16 & 17 Vict. c. 107, s. 163.

(*l*) Sect. 328.

(*m*) Called "The Customs Consolidation Act, 1853."

(*n*) Called "The Supplemental Customs Consolidation Act, 1855."

vessels are subjected in any foreign country to any *prohibitions* or *restrictions* as to the voyages in which they may engage, or the articles which they may import or export, her majesty may, by order in council, impose such prohibitions and restrictions upon the ships of such country in reference to the same subject, as she may think fit,—so as to place such ships as nearly as possible on the same footing as that on which British ships are placed in the ports of the country to which the former ships belong:—and further, that if it shall appear that British ships are directly or indirectly subjected in any foreign country to *duties or charges* from which the national vessels of such country are exempt; or that any duties are imposed there upon articles imported or exported in British ships, which are not equally imposed upon the like articles in national vessels; or that *any preference whatsoever is shown,* either directly or indirectly, to vessels of such country over British vessels, or to articles imported or exported in the former, over the like articles imported or exported in the latter; or that British trade and navigation are not placed by such country on *as advantageous a footing as the trade and navigation of the most favoured nation;*—her majesty may in such case, by order in council, impose such duties of tonnage upon the ships of such nation, or such duties on goods imported or exported in its ships, as may appear justly to countervail the disadvantages to which British trade or navigation is so subjected (*o*).

Such, in a summary point of view, is the effect of those laws of navigation of which we proposed to treat. There are also legislative provisions, of a special kind, with respect to the trade with any British possessions on or

(*o*) See also 15 & 16 Vict. c. 47, "An Act to enable her Majesty to abolish otherwise than by treaty, on condition of reciprocity, differential duties on foreign ships." And 25 & 26 Vict. c. 63, ss. 57—64, making arrangements concerning lights, sailing rules, salvage, and measurement of tonnage, in the case of foreign ships.

near the Continent of Europe, or in Africa, or within the Mediterranean Sea; and with respect to the trade with India and China, and the coasting trade of India. But any detail of these would carry us beyond the limits which it is necessary to observe in the present chapter. It must suffice to refer the reader to 3 & 4 Will. 4, c. 93; 3 & 4 Vict. c. 56; 6 & 7 Vict. c. 80; 16 & 17 Vict. c. 107, ss. 327, 329; 17 & 18 Vict. c. 104, s. 108 (*p*).

As to the next five of the subjects enumerated at the outset of this chapter, the laws relating to them were some time ago thrown into a single Act, viz. the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104); and the account therefore which we shall have to give of the law under these heads will be chiefly taken from that Act (*q*), as amended in some respects by subsequent statutes, viz., 18 & 19 Vict. c. 91; 25 & 26 Vict. c. 63; 30 & 31 Vict. c. 124; 34 & 35 Vict. c. 110; 35 & 36 Vict. c. 73, and 36 & 37 Vict. c. 85 (*r*).

With regard to the whole of the matters which are embraced under these five heads, we may make the preliminary remark, that they are all placed under the general superintendence of that committee of the privy council which is commonly described as the Board of Trade (*s*). But it will be necessary to treat of those subjects severally

(*p*) These provisions with respect to trade with India and China must be taken as subject to the 21 & 22 Vict. c. 106, which vested in her majesty all the rights and powers of the East India Company—a society now dissolved by 36 & 37 Vict. c. 17. By 21 & 22 Vict. c. 106, s. 21, all the provisions in the above Acts referring to the company and the court of directors, and court of proprietors thereof, are to be construed as referring to the secretary of state in council (vide sup. vol. I. pp. 112, 113).

(*q*) This Act embraces the subjects of shipping, masters and seamen, safety and prevention of accidents, pilotage, lighthouses, wrecks and salvage, liability of ship-holders, and legal procedure. By a statute of the same session (17 & 18 Vict. c. 120) numerous prior enactments on these subjects were repealed.

(*r*) See also the Merchant Shipping *Colonial* Act, 1869 (32 Vict. c. 11).

(*s*) 17 & 18 Vict. c. 104, s. 6. Vide sup. vol. II. p. 462.

and successively; in such general and summary manner, at least, as is suitable to the plan and nature of the present work. We proceed then to consider—

II. The laws relating to the ownership, registration and transfer of merchant ships (*t*).

And here the Merchant Shipping Acts provide (*u*), that no ship shall be deemed a British ship unless she belong wholly to owners who are of one of the following descriptions:—Natural-born subjects—persons made denizens, or naturalized by act of parliament or by the proper legislative authority in some British possession—or bodies corporate established under, subject to the laws of, and having their principal place of business in, the united kingdom or some British possession (*v*). And even as to the capacity of natural-born subjects and persons naturalized or made denizens, there are some restrictive conditions (*x*). It is also provided that every British ship—subject to some few exceptions—must be *registered* (*y*);

(*t*) These laws apply to the whole of her majesty's dominions (17 & 18 Vict. c. 104, s. 17).

(*u*) The group of statutes including, and in amendment of, 17 & 18 Vict. c. 104, may be cited as the "Merchant Shipping Acts, 1854 to 1873" (36 & 37 Vict. c. 85, s. 2).

(*v*) 17 & 18 Vict. c. 104, s. 18.

(*x*) As to natural-born subjects, it is provided by sect. 18, that none can be an owner who has taken the oath of allegiance to any foreign sovereign or state, unless he has subsequently taken the oath of allegiance to her majesty, and is and continues during the whole of his ownership resident within her majesty's dominions, or if not so resident, then is a member of a British factory or partner in a house actually carrying on business within her majesty's dominions. As to persons made denizens or naturalized, it is made a condition that such persons shall have subsequently taken the oath of allegiance to her majesty, and shall continue during the whole of their ownership resident within her majesty's dominions; or if not so resident, shall be members of a British factory or partners in a house actually carrying on business within those dominions. It is to be noticed that nothing contained in the Naturalization Act, 1870, is "to qualify an 'alien' to be the owner of a British ship" (33 & 34 Vict. c. 14, s. 14).

(*y*) 17 & 18 Vict. c. 104, ss. 19, 50. The exceptions are—1. Ships registered prior to 1st May, 1855. 2. Ships not exceeding fifteen tons burthen employed solely on the rivers

and that, unless registered, she shall not be recognized as such, so as to be entitled to any of the advantages or protection usually enjoyed by British ships, or to use the national flag or assume the national character (*z*). This registration may be made in the united kingdom at any port approved by the proper authority for the registry of ships (*a*); and is to be made with the collector, comptroller, or other principal officer of the customs there (*b*); and the port at which any ship is registered is thereafter to be considered as that to which she belongs; until the registry is transferred (as it may be) to another (*c*). It is further provided, with respect to the registration, that it must comprise, *inter alia*, the name of the ship, which must have been previously marked thereon in a permanent and conspicuous manner to the satisfaction of the Board of Trade (*d*), and which is incapable of being afterwards changed (*e*) unless by leave of the Board; and the names and descriptions of the owners (*f*). But in connection with this registration of the owners, the following points also require attention:—1. The property in every ship is always to be divided for this purpose into sixty-four shares (*g*). 2. No person is to be registered as owner of any fractional part of a share (*h*). 3. The individuals registered as owners are not to exceed thirty-two in the whole, except that any number not exceeding five

or coasts of the united kingdom, or of some British possession within which the managing owners reside. 3. Ships not exceeding fifty tons burthen, and not having a whole or fixed deck, employed solely coastwise, on the shores of Newfoundland, or parts adjacent, or in the Gulf of St. Lawrence, or such portion of the coasts of Canada, Nova Scotia, or New Brunswick, as lie bordering on such gulf.

(*z*) 17 & 18 Vict. c. 104, ss. 19, 106.

(*a*) But see 31 & 32 Vict. c. 129, as to registration in the colonies in certain cases.

(*b*) 17 & 18 Vict. c. 104, s. 30.

(*c*) Sects. 33, 89; 18 & 19 Vict. c. 91, s. 12.

(*d*) See 36 & 37 Vict. c. 85, s. 3.

(*e*) 17 & 18 Vict. c. 104, s. 34; 34 & 35 Vict. c. 110, s. 6.

(*f*) 17 & 18 Vict. c. 104, s. 42.

(*g*) Sect. 37.

(*h*) Ibid.

may be registered as joint owners of any share (*i*). 4. The property in the ship or its shares, so far as regards the power of making a valid title as owner to a purchaser, is vested exclusively in the registered owners (*k*); though any number of other persons may be *beneficially or equitably* interested, and may enforce their rights in that capacity, in case of breach of trust, by application to Chancery (*l*). Again, it is provided, that a registered ship, or any share therein, when disposed of to a person qualified to be owner of a British ship (*m*), shall be *transferred* by a bill of sale under seal, according to a prescribed form; upon which the name of the transferee shall be entered on the register book (*n*); and also that a registered ship or any share therein may be *mortgaged* by instrument in a form prescribed for that purpose (*o*), and the mortgage shall be entered in the register book (*p*). And it is *inter alia* enacted, that, where there are several mortgagees, their respective priorities are to be in all cases according to the time at which each security was registered, and not the time at which it was executed (*q*).

III. The laws relating to merchant seamen.

These have chiefly in view the great national object of promoting the increase of our mercantile mariners, of securing their efficiency and discipline, and of affording them all due encouragement and protection.

The Merchant Shipping Acts provide that local marine boards shall be established at certain of the sea ports of the

(*i*) 17 & 18 Vict. c. 104, s. 37.

(*k*) Sect. 43.

(*l*) Sects. 37, 65. And see 25 & 26 Vict. c. 63, s. 3.

(*m*) See 17 & 18 Vict. c. 104, ss. 55, 56, 96; 18 & 19 Vict. c. 91, s. 11.

(*n*) 17 & 18 Vict. c. 104, s. 66.

(*o*) Sect. 66. See Dickinson *v.* Kitchen, 8 Ell. & Bl. 789; Ward *v.* Beck, 13 C. B., N. S. 668; The Innisfallen, Law Rep., 1 Adm. & Ecc. 72.

(*p*) Sect. 67.

(*q*) Sect. 69. Ship transfers and assignments need not be *filed* under 17 & 18 Vict. c. 36.

united kingdom, for carrying into effect their provisions, under the superintendence of the Board of Trade (*r*). And that in every such sea port, the local marine board shall establish a mercantile marine office or offices, under the management of *Superintendents* (*s*); whose business it shall be to afford facilities for engaging seamen by keeping registries of their names and characters (*t*); to superintend and facilitate their engagement and discharge; to provide means for securing the presence on board, at the proper times, of men who are so engaged; to encourage the making of apprenticeships to the sea service; and generally to perform such other duties relating to merchant seamen and merchant ships, as shall be committed to them by the Board of Trade (*u*).

It is further provided, that examinations shall be instituted for persons intending to become masters or mates of foreign-going ships, or home-trade passenger ships, before examiners appointed by the local marine board (*x*). And that no person shall be employed in a foreign-going ship as master, or as first or second or only mate—or in a home-trade passenger ship, as master or first or only mate—unless he possesses a "certificate of competency" as the result of such examination: or (in the case of a person who has attained a certain rank in the service of her majesty) a "certificate of service:" either of which certificates (according to the nature of the case) is to be granted by the Board of Trade to such persons as it finds to be entitled to them (*y*).

(*r*) 17 & 18 Vict. c. 104, s. 110, and see 36 & 37 Vict. c. 85, s. 10.

(*s*) 17 & 18 Vict. c. 104, s. 122; 25 & 26 Vict. c. 63, s. 15.

(*t*) The expression "seamen" is to include every person (except masters, pilots, and apprentices duly indentured and registered) employed or engaged in any capacity on board any ship. (17 & 18 Vict. c. 104, s. 2.)

(*u*) Sect. 124.

(*x*) Sect. 131. See 25 & 26 Vict. c. 63, s. 17, providing for the examination of candidates at places where there is no local marine board.

(*y*) 17 & 18 Vict. c. 104, ss. 134—140. As to certificates of competency and of service for *engineers* in *steamers*, see 25 & 26 Vict. c. 63, ss. 5—12. As to the cancellation or

In addition to these provisions there are a variety of others, intended for the protection of seamen, and for promoting their health and comfort; from among which we may extract the following (*z*).

That the master of every ship—except those of less than eighty tons burthen, exclusively employed in the coasting trade of the united kingdom—shall enter into an agreement with every seaman whom he carries to sea from any part of the united kingdom (*a*). This is to be in a form sanctioned by the Board of Trade, and signed by both master and seaman: and it is to set forth the nature and duration of the voyage, or else the maximum period of the voyage or engagement, and the places or parts of the world (if any) to which it is not to extend (*b*); the number and description of the crew; the time at which each seaman is to be on board, or to begin work; the capacity in which he is to serve; the amount of wages (*c*); a scale of provisions; regulations as to conduct; and such punishments for misconduct as the form issued by the Board of Trade shall have sanctioned, and as the parties shall agree to adopt (*d*). The Acts also provide that no right to wages shall be dependent on the earning of freight (*e*); and that every stipulation on the part of the seaman for abandoning his right to wages, in the event of the loss of the ship, shall be inoperative (*f*). That every place, occupied by any seaman or apprentice in any ship,

suspension of certificate, see 25 & 26 Vict. c. 63, ss. 23, 24.

(*z*) From some of these provisions (contained in 17 & 18 Vict. c. 104, Part III.), such sea-going ships as are *fishing* or *lighthouse* vessels or *pleasure yachts* are excepted. (See 25 & 26 Vict. c. 63, s. 13.)

(*a*) See as to "time" agreements, 35 & 36 Vict. c. 73, s. 16.

(*b*) 36 & 37 Vict. c. 85, s. 7.

(*c*) As to the mode of payment (which, where practicable, is to be in money and not by bill), see 25 & 26 Vict. c. 63, s. 19.

(*d*) 17 & 18 Vict. c. 104, s. 149.

(*e*) Sect. 183. The maxim of law formerly was, that freight was the mother of wages.

(*f*) Sect. 182. There is an exception as to this, made in the case of ships employed on *salvage* service. (25 & 26 Vict. c. 63, s. 18.)

shall have such space as is in the Acts particularly specified (*g*); shall be kept free from stores or goods of any kind not being the property of the crew in use during the voyage; and shall be properly caulked and constructed, and well ventilated (*h*). That every ship navigating between the united kingdom and any place out of the same shall be properly supplied with medicines, to be examined by medical inspectors, to be appointed for that purpose (*i*). That "official log-books" shall be kept in every ship, (except those employed exclusively in the coasting trade of the united kingdom,) in such form as is prescribed by the Board of Trade, either in connection with or distinct from the ordinary log-books; and that in all cases entry shall be made in the official log-books as soon as possible after the occurrence to which it relates; and that among the occurrences shall be entered every punishment inflicted, (together with the offence,) and every case of illness, injury or death (*j*).

Moreover, careful provisions have been made, to protect seamen as well as others from the dangers which arise from ships being sent to sea in an unsafe condition. Thus, in the first place, it is enacted by the 34 & 35 Vict. c. 110, s. 7, that when any seaman or apprentice is proceeded against for deserting his ship, or neglecting or refusing to join, or being absent or quitting her without leave, and it shall be alleged by a certain proportion of the seamen belonging to the ship that the ship is by reason of unseaworthiness, overloading, improper loading, defective equipment, or for any other reason, not in a fit condition to proceed to sea, or that the accommodation in such ship is insufficient, the court having cognizance of the case may inquire into the allegations, and in case of doubt

(*g*) See as to this, 30 & 31 Vict. c. 124, s. 9.

(*h*) 17 & 18 Vict. c. 104, s. 231.

(*i*) Sects. 224, 226. And as to the medical inspection of seamen, see 30 & 31 Vict. c. 124, s. 10.

(*j*) 17 & 18 Vict. c. 104, ss. 280—282.

may order a survey of the vessel, and the costs of such survey are directed to follow the event.

Moreover, by 36 & 37 Vict. c. 85, s. 12, where the Board of Trade have received a complaint, or have reason to believe that any British ship is by reason of the defective condition of her hull, equipments or machinery, or of her overloading or improper loading, unfit to proceed to sea without serious danger to human life, they may order a survey of the ship by some competent person; may direct that the ship shall be detained for the purpose of such survey; and, on the report of the surveyor, may make such further order as they shall think requisite as to the detention of the ship or as to her release, either absolutely or upon the performance of such conditions with respect to the execution of repairs or alterations, or the unloading or loading of cargo, as the board may impose.

If upon such survey the vessel is reported to have been, having regard to the nature of the service for which she was intended, unfit as alleged, the expenses of the Board of Trade in respect of the survey shall be paid by the owner and recoverable from him as salvage; but otherwise the Board shall be liable to pay compensation to any person who has sustained injury by the survey by reason of the detention or otherwise; though where the ship has been surveyed in consequence of a complaint, the expenses of the Board and the amount of damages it has had to pay, may be recovered by them from the complainant. The decision of the Board of Trade, however, in regard to such survey is not final, power being given to the owner to make application for an order for a fresh survey to any court having admiralty jurisdiction; and where such application is made to a county court it shall be deemed to be an admiralty cause within the meaning of "The County Courts Admiralty Jurisdiction Act, 1868" (*k*).

In addition to these provisions, it is enacted by the

(*k*) 36 & 37 Vict. c. 85, s. 14.

34 & 35 Vict. c. 110, s. 11, that every person with authority as owner or otherwise, who shall send a ship to sea in an unseaworthy state, so as to endanger the life of any person belonging to or on board the same, shall be guilty of a misdemeanor (which shall not be punishable on summary conviction), unless he proves that he used all reasonable means to make and keep the ship seaworthy, and was ignorant of such unseaworthiness; or that her going to sea in an unseaworthy state was, under the circumstances, reasonable and unavoidable.

We may conclude our observations on this head by noticing that, with the important object of affording general information from time to time, as to the state of our mercantile marine, it is provided that there shall be in the port of London a "General Register and Record Office for Seamen" (*l*);—that the master of every foreign-going ship shall, within forty-eight hours after her arrival at her final port of destination in the united kingdom, or upon discharge of the crew, (whichever first happens,) deliver to the Superintendent of the Mercantile Marine Office before whom the crew is discharged, a list containing, *inter alia*, the number and date of the ship's register and her registered tonnage (*m*); the length and general nature of her voyage or employment; the names, ages and places of birth of the master, the crew, and the apprentices; their qualities on board their last ships or other employment; and the dates and places of their joining the ship. It is further enacted that the master or owner of every home-trade ship shall, every half year, transmit or deliver to some Mercantile Marine Superintendent in the united kingdom, a similar list for the preceding half year: and that all such lists, together with other documents in the Acts particularized, shall be transmitted by the Superintendents by whom they have been received to the Registrar-general of shipping and seamen; to be by him

(*l*) 17 & 18 Vict. c. 104, s. 271. (*m*) Sec 25 & 26 Vict. c. 63, s. 4.

recorded and preserved and produced to any person desirous of inspecting the same (*n*). In addition to which it is directed, that there shall be transmitted, by the proper authorities, every half year, to such Registrar-general a list of all ships which shall be registered in any port in the united kingdom; and also of all ships whose registers have been transferred or cancelled in such port since the last preceding return (*o*).

IV. The laws relating to pilotage.

The Merchant Shipping Acts (*p*) recognize and confirm the powers and jurisdictions theretofore lawfully exercised by various bodies of persons in different parts of the kingdom, with regard to the appointment and regulation of pilots for the districts for which they respectively act (*q*),—the most important of which bodies being the Trinity House of Deptford Strond; which is a company of masters of ships incorporated in the reign of Henry the eighth, and charged by many successive charters and acts of parliament with numerous duties relating to the marine.

These bodies—under the common name of "Pilotage Authorities" (*r*)—are severally enabled, by bye-laws, to be made with consent of her majesty in council, to determine the qualifications to be required from persons applying to them to be licensed as pilots, whether in respect of their age, skill, time of service, character, or otherwise; to issue licences accordingly to such persons

(*n*) 17 & 18 Vict. c. 104, ss. 273—277.

(*o*) Sect. 278.

(*p*) 17 & 18 Vict. c. 104, ss. 330—388; 25 & 26 Vict. c. 63, ss. 39—42. The provisions relative to *pilotage* apply to the united kingdom only. (17 & 18 Vict. c. 104, s. 330.)

(*q*) Sect. 331. See also 16 & 17 Vict. c. 129, ss. 3 et seq.

(*r*) 17 & 18 Vict. c. 104, ss. 2, 331. By 25 & 26 Vict. c. 63, s. 39, the Board of Trade is entrusted with additional powers in reference to *pilotage authorities;* and, in particular, are enabled to constitute a pilotage authority, and to fix its district (in which, however, there shall be no *compulsory* pilotage) in any place in the united kingdom, where there is no such authority.

as are qualified (*s*); and to make regulations for the government of the pilots they so license (*t*). They are also required to deliver periodically to the Board of Trade returns comprising a variety of particulars; and, among these, the names and ages of all pilots or apprentices acting under their authority; and the nature of the service for which each is licensed (*u*). And the returns so made are to be laid by the Board of Trade, without delay, before both houses of parliament (*x*).

It is also provided, that every pilotage authority shall have power by bye-law, made with consent of her majesty in council, to exempt (within the limits of their respective districts) the masters of any ships, or of any classes of ships, from being compelled to employ qualified pilots (*y*); and that the Board of Trade shall have power, by provisional order to be confirmed by act of parliament, to exempt masters from being obliged to employ pilots in any, or in any part of any, pilotage district (*z*). It is also enacted that the master or mate of any ship may apply to any pilotage authority to be examined as to his capacity to pilot the ship to which he belongs, or any one or more ships belonging to the same owner, within any part of the district of such pilotage authority; and that if he be found competent, a pilotage certificate shall be granted to enable him to pilot any of such ships himself within the limits therein described, without incurring a penalty for failing to employ a qualified pilot (*a*). But every master of an *unexempted* ship navigating within any district, who—after a qualified pilot has offered to take charge of her, or has made a signal for that purpose—either himself pilots her without possessing a pilotage certificate enabling him to

(*s*) As to *recalling* a licence, see 17 & 18 Vict. c. 104, s. 852, and the case of Henry *v.* Newcastle Trinity House Board, 8 Ell. & Bl. 723. As to *special* licences, see 35 & 36 Vict. c. 73, s. 11.

(*t*) 17 & 18 Vict. c. 104, s. 333.

(*u*) Sect. 337.

(*x*) Sect. 339.

(*y*) Sect. 332.

(*z*) 25 & 26 Vict. c. 63, s. 39 (4).

(*a*) 17 & 18 Vict. c. 104, s. 340, and see sect. 355.

do so, or employs, or continues to employ, an unqualified person to pilot her; and every master of an *exempted* ship who, under the like circumstances, employs or continues to employ an unqualified person to pilot her;—incurs, for every such offence, a penalty of double the amount of pilotage demandable for the conduct of such ship (*b*).

With regard to the Trinity House in particular, it is allowed to appoint and license pilots for the limits following, that is to say, 1. "The London District," comprising the waters of the Thames and Medway as high as London Bridge and Rochester Bridge respectively, and also the seas and channels leading thereto or therefrom as far as Orfordness to the north and Dungeness to the south—but so nevertheless that no pilot shall be licensed to conduct ships both above and below Gravesend. 2. "The English Channel District," comprising the seas between Dungeness and the Isle of Wight. 3. "The Trinity House Outport Districts," comprising any pilotage district for the appointment of pilots, within which no particular provision is made by act of parliament or charter (*c*). And it is to be noticed that, as the general rule, the employment of pilots in the first and third of these districts is compulsory (*d*). But this is subject to an enactment that certain classes of ships, *when not carrying passengers* (*e*), shall be exempted from compulsory pilotage in the London District and the Trinity House Outport Districts, that is

(*b*) 17 & 18 Vict. c. 104, s. 353. As to this section, see The Queen *v.* Stanton, 8 Ell. & Bl. 445; The Tyne Improvement Commissioners *v.* The General Steam Navigation Company, 2 Law Rep., Q. B. 65.

(*c*) 17 & 18 Vict. c. 104, s. 370, A separate pilotage authority has been established for the *Bristol* Channel. (See 24 & 25 Vict. cap. ccxxxvi.; 25 & 26 Vict. c. 63, s. 42.)

(*d*) 17 & 18 Vict. c. 104, s. 376. (See the case of "The Hanna," Law Rep., 1 Adm. & Ecc. 283.) As to the penalty for not employing a qualified pilot where it is compulsory to do so, see sects. 354, 376. As to sect. 354, vide post, pp. 187, 188, n. (*p*).

(*e*) See "The Lion," Law Rep., 2 Adm. & Ecc. Ca. 102.

to say, 1. Ships employed in the coasting trade of the united kingdom. 2. Ships of no more than sixty tons burthen. 3. Ships trading to Boulogne, or to any place in Europe north of Boulogne. 4. Ships from Guernsey, Jersey, Alderney, Sark, or Man, being wholly laden with stone, the produce of those islands. 5. Ships navigating within the limits of the port to which they belong. 6. Ships passing through the limits of any pilotage district, on their voyages between two places, both situate out of such limits, and not being bound to any place within such limits, nor anchoring therein (*f*).

There is also a general provision, that no owner or master of any ship shall be answerable to any person whatever for any loss or damage occasioned by the fault or incapacity of any qualified pilot acting in charge of such ship, within any district where the employment of such pilot is compulsory by law (*g*).

V. The laws relating to lighthouses, beacons, and sea marks.

The power of erecting, placing and maintaining these is incident to the royal prerogative (*h*). By 8 Eliz. c. 13, however, it was specially committed to the Trinity House; and the authority of this corporation has, since the reign of Elizabeth, been confirmed and regulated by several modern statutes; but principally by the Merchant Shipping Acts now under consideration (*i*), in

(*f*) 17 & 18 Vict. c. 104, s. 379. See 25 & 26 Vict. c. 63, s. 41.

(*g*) 17 & 18 Vict. c. 104, s. 388. On the construction of this section the cases are numerous. See (amongst others) Tyne Improvement Commissioners *v.* General Steam Navigation Company, Law Rep., 2 Q. B. 65; General Steam Navigation Company *v.* Bristol and Colonial Steam Navigation Company, ib. 3 Exch. 330; 4 Exch. 238; "The Iona," ib. 1 P. C. Ca. 426; Moss *v.* The African Steam Ship Company, ib. 2 P. C. Ca. 238; "The Lion," ib. 525.

(*h*) Vide sup. vol. II. p. 502.

(*i*) See 17 & 18 Vict. c. 104, ss. 2, 389–416; 18 & 19 Vict. c. 91, ss. 1–8; 25 & 26 Vict. c. 63, ss. 43–48.

which are to be found almost all the provisions relating to that subject which are now in force (*k*).

By these Acts, then, it is provided, that, subject to any power or rights theretofore lawfully exercised by any persons having authority over *local* lighthouses, buoys or beacons (*l*),—such persons being by the Acts styled "Local Authorities,"—the superintendence and management of all lighthouses, buoys and beacons shall be vested (for England, Wales, Jersey, Guernsey, Sark and Alderney, and the adjacent seas and islands, and for Heligoland, and Gibraltar), in the *Trinity House*;—(for Scotland and the adjacent seas and islands, and the Isle of Man), in the *Commissioners of Northern Lighthouses*;—(for Ireland and the adjacent seas and islands), in the *Port of Dublin Corporation* (*m*);—these three bodies being distinguished from the "Local Authorities" by the name of General Lighthouse Authorities (*n*); and each of the latter having power, with sanction of the Board of Trade, to regulate, within its own jurisdiction, the proceedings of the former (*o*); while the latter are themselves under the inspection of the Board of Trade.

To each of the General Lighthouse Authorities, within their respective jurisdictions, the Acts give power to erect or make new lighthouses, buoys or beacons, or alter or remove existing ones; and to vary the character of any lighthouse, or the mode of exhibiting lights thereon (*p*). But these powers are not to be exercised in the case of the General Lighthouse Authorities for Scotland or Ireland, without the sanction of the Trinity House; which

(*k*) A variety of former enactments with respect to lighthouses, beacons and sea marks are repealed by 17 & 18 Vict. c. 120.

(*l*) The term "lighthouses" is to include floating and other lights exhibited for the guidance of ships; and "buoys and beacons" includes all others marks and signs of the sea. (17 & 18 Vict. c. 104, s. 2.)

(*m*) The case of colonial lighthouses is separately provided for by 18 & 19 Vict. c. 91.

(*n*) 17 & 18 Vict. c. 104, s. 389.

(*o*) Sect. 394. And as to lighthouses, see 25 & 26 Vict. c. 63, ss. 43—48.

(*p*) 17 & 18 Vict. c. 104, s. 404.

sanction is itself to be subject, in such manner as the Acts point out, to the paramount control of the Board of Trade (*q*). Power is also given to the *Trinity House*, (acting under the previous sanction of the Board of Trade,) to direct the *Commissioners of Northern Lighthouses*, or the *Port of Dublin Corporation*, (within their respective jurisdictions,) to continue any existing lighthouses, buoys or beacons,—to erect or place, alter or remove, any new ones,—or to vary the character of any lighthouse, or the mode of exhibiting lights therein (*r*).

Again, the Acts provide, that upon the completion of any new lighthouse, buoy or beacon, her Majesty may by order in council fix reasonable *dues* to be paid by the master or owner of every ship passing or deriving benefit from the same (*s*). But no such dues in Guernsey, Jersey, Sark, or Alderney, are to be taken without consent of the States of those islands respectively. Nor shall any powers given to the Trinity House in respect of any lighthouse, buoy or beacon, placed or hereafter to be placed in Guernsey or Jersey, be exercised without consent of her Majesty in council (*t*).

The same Acts contain, moreover, provisions against such persons as shall either wilfully or negligently injure any lighthouse, buoy or beacon; or remove, alter or destroy any light-ship, buoy or beacon; or ride by, make fast to, or run foul of any light-ship or buoy; or who shall burn or exhibit (after being duly warned to the contrary by notice from the proper General Lighthouse Authority) any fire or light so placed as to be liable to be mistaken for a light proceeding from a lighthouse (*u*).

VI. The laws relating to the liability of shipowners for loss or damage.

In a former portion of this work, while discussing the

(*q*) 17 & 18 Vict. c. 104, s. 405, 406. As to light dues, see also 25 & 26 Vict. c. 63, ss. 44—47.

(*r*) Sects. 408, 409.

(*s*) Sect. 410.

(*t*) 17 & 18 Vict. c. 104, s. 411.

(*u*) Sects. 414—416.

law of carriers, we had occasion incidentally to state the nature and extent of a shipowner's responsibility where loss or damage has occurred to *goods* on board of his ship and entrusted to him for carriage; and to that statement the reader is consequently now referred (*x*). The responsibility of the shipowner, however, is not confined to such goods. It exists also where *loss of life* or *personal injury* has, through mismanagement of his ship, been occasioned to any person; and where loss or damage has, through the like cause, occurred to *any other ship or boat, or to goods on board of the same.* But a limit is placed by statute to the amount of damages recoverable from a shipowner who is personally blameless. For, it is provided by 25 & 26 Vict. c. 63, s. 54 (*y*), that, in case loss arises without his actual fault or privity, the owner of any ship (whether British or foreign) shall not be answerable in damages in respect of *loss of life or personal injury* (either alone or together with loss or damage to property), to an aggregate amount exceeding *fifteen pounds* for each ton of the ship's tonnage; nor in respect of injury to *property* (whether there be in addition loss of life or personal injury or not), to an aggregate amount exceeding *eight* pounds for each ton of such tonnage (*z*).

With a view also to the protection of the shipowner from the multiplicity of actions to which a single casualty may otherwise expose him, where loss of life or other personal injury has resulted, or is alleged to have resulted, to several persons with different claims and rights—and to mitigate, in other respects, the severity of its consequences as regards the compensation to be made by him—the following method of procedure is established by 17 & 18 Vict.

(*x*) Vide sup. vol. II. p. 89.

(*y*) See the case of "The Obey," Law Rep., 1 Adm. & Ecc. 102. By this section, the provision on this subject (sect. 504) contained in 17 & 18 Vict. c. 104, is repealed.

(*z*) The connection between this provision and that contained in Lord Campbell's Act (9 & 10 Vict. c. 93), in respect of injuries fatal to life, is discussed in the case of Glaholm *v.* Barker, Law Rep., 1 Ch. App. 223.

c. 104, for settlement of his total liability in regard to all such results.

The Board of Trade may direct any sheriff to summon a jury to inquire into the number, names and descriptions of all persons killed or injured on board ship by reason of any wrongful act, neglect, or default;—at which inquiry the sheriff shall preside, and the Board of Trade shall be deemed plaintiff, and the shipowner by whom the liability is alleged to have been incurred the defendant (*a*). If the verdict is for the defendant, his costs are to be paid him by the Board of Trade, out of the Mercantile Marine Fund (*b*): if for the plaintiff, damages are to be assessed at 30*l.* for each case of death or personal injury (*c*). The aggregate damages are to be paid to her Majesty's paymaster-general, and distributed by him as the Board of Trade directs; the Board having power to direct payment to each person injured—or in case of a death, to the husband, wife, parent or child of the deceased—of such compensation, (not exceeding in any case the statutory amount,) as may be thought fit. Until this inquiry has been instituted,—or until the Board has refused to institute it (*d*), —no person is to be entitled to commence any legal proceeding in respect of his claim for loss of life or personal injury arising out of any such accident (*e*): but after its completion, if any person injured (or, in case of his death, his personal representative) estimates the damages in respect of such injury at a greater sum than the statutory

(*a*) 17 & 18 Vict. c. 104, ss. 507 et seq.

(*b*) This fund comprises a variety of different fees and sums received under the Act by the Board of Trade, the Trinity House, and Receivers of Wreck; and it is chargeable with the expense of a variety of services under the Act. The account of it is kept with her Majesty's paymaster-general. — Sect. 417.

(*c*) This limit applies only to damages assessed under inquiries instituted by the Board of Trade. (Glaholm *v.* Barker, Law Rep., 2 Eq. C. 598.)

(*d*) A refusal will be presumed where the Board institutes no inquiry for one month after the service of a notice, by any person, of his desire to commence a legal proceeding.—Sect. 512.

(*e*) Ibid.

amount, (or such amount as the Board of Trade thinks fit to accept by way of compromise,)—he is to be at liberty, upon repayment to the ship owner of the amount he has thus paid, to bring his action for damages, as if no power of instituting an inquiry had been given to the Board. This, however, is subject to a proviso, that any damages which he may recover shall be payable only out of the residue (if any) of the aggregate amount for which the owner is liable, after deducting therefrom all sums he has paid to the paymaster-general; and if the damages recovered do not exceed double the statutory amount, he shall pay the defendant all the costs of the action, to be taxed as between attorney and client (*f*).

Nor are these the only provisions of the Acts for protection of the shipowner; for it is also enacted (*g*), that in all cases where there are several claims against any owner for compensation,—whether for loss of life or personal injury, or for the loss or damage of ships, boats or goods,—equitable proceedings may be instituted at the suit of the owner (subject only to the right given as above mentioned to the Board of Trade), for the purpose of determining his aggregate liability; and the court may distribute the amount rateably among the several claimants; and stop all other proceedings in relation to the same subject-matter (*h*).

With regard, however, to all the provisions of these Acts, tending to the benefit of the shipowner, it is material to remark, that none of them is to lessen or to take away any liability to which any *master* or *seaman*, being also owner or part owner of the ship to which he belongs, is subject in his capacity of master or seaman (*i*). Moreover, they do not, in general, extend to any but *recognized*

(*f*) 17 & 18 Vict. c. 104, s. 511.

(*g*) Sect. 514.

(*h*) As to proceedings at the suit of the ship owner, see 53 Geo. 3, c. 159; 17 & 18 Vict. c. 125, s. 88; 23 & 24 Vict. c. 126, ss. 34, 35; 24 Vict. c. 10, s. 13; "The Guldfaxe," Law Rep., 2 Ad. & Ecc. Ca. 325.

(*i*) 17 & 18 Vict. c. 104, s. 514.

British ships (*k*); but to this an exception is made in favour of shipowners sued for damages in consequence of a loss arising without their actual fault or privity,—for the limitation of the damages to which they are in such cases answerable, applies (it will be observed) to a *foreign* as well as a British ship (*l*).

VII. The laws relating to fisheries.

We cannot, consistently with the design and limits of the present work, attempt to detail the numerous provisions which our statute book contains in regard to fisheries. It will suffice to point out some of the principal features of our policy in relation to this subject.

And, first, we may remark, (as to England and Scotland,) that a great variety of enactments have been passed in modern times relating to fisheries; and especially for the protection of the breed of fish, and the prevention of any practices tending to destroy the spawn or fry. These are chiefly contained in the following statutes:—18 Geo. III. c. 33; 44 Geo. III. c. xlv; 46 Geo. III. c. xix; 9 Geo. IV. c. 39; 7 & 8 Vict. c. 95; 8 & 9 Vict. c. 26; 9 & 10 Vict. c. 80; 10 & 11 Vict. cc. 91, 92; 14 & 15 Vict. c. 26; 21 & 22 Vict. c. cxli; 23 & 24 Vict. c. 92; 24 & 25 Vict. cc. 72, 109; 25 & 26 Vict. c. 97; 26 & 27 Vict. c. 50; 27 & 28 Vict. c. 118; 28 & 29 Vict. cc. 22, 121; 29 & 30 Vict. c. 102; 30 & 31 Vict. c. 52; 31 & 32 Vict. cc. 45, 111; 32 & 33 Vict. c. 31; 33 & 34 Vict. c. 103; 36 Vict. c. 13; 36 & 37 Vict. cc. 71, 75 (*m*).

(*k*) Sect. 516. As to the term "recognized British ship," vide sup. p. 148.

(*l*) Vide sup. p. 162. It may be here remarked, that *foreign ships*, while within British jurisdiction, are now made subject to certain of the regulations contained in the Merchant Shipping Acts for preventing *collisions*, and as to *the carriage of dangerous goods*, and in reference to *salvage of life*. (See 25 & 26 Vict. c. 63, ss. 38, 57—59.)

(*m*) Of the above group of statutes, especial notice is due to the "Salmon Fishery Acts, 1861 to 1873," viz. 24 & 25 Vict. c. 109; 29 & 30 Vict. c. 102, and 36 & 37 Vict. c. 71 (as to which see Leconfield *v.* Lonsdale, Law Rep., 5 C. P.

Secondly, that the trade in fish, as regards the cities of London and Westminster, is governed by certain statutes passed for its regulation; the general object of which is to secure a supply of fresh fish to those cities, and to prevent the same being forestalled. These Acts are 2 Geo. III. c. 15; 9 & 10 Vict. c. cccxlvi; and 22 & 23 Vict. c. 29.

Thirdly, that fresh fish of British taking, and imported in British ships, may be landed in this country without report or entry (*n*).

Fourthly, that Acts have been of late years frequently passed, enabling commissioners, appointed for the purpose, to sanction the loan of monies out of the consolidated fund, for the encouragement of the *fisheries*, as well as of public works and other national undertakings; the last of which Acts was the 30 & 31 Vict. c. 32.

Fifthly, that *bounties* were formerly payable by statute, upon the taking and curing of fish of various descriptions, and on the vessels employed in various branches of the fisheries; but that the policy of the legislature in this respect is now altered, and that these bounties were abolished by 1 & 2 Geo. IV. 79; 5 Geo. IV. c. 64; and 7 Geo. IV. c. 34 (*o*).

Sixthly, that the fisheries of *Ireland* (in particular) are now regulated by recent Acts, viz. 5 & 6 Vict. c. 106; 7 & 8 Vict. c. 108; 8 & 9 Vict. c. 108; 9 & 10 Vict. cc. 3, 114; 10 & 11 Vict. c. 75; 11 & 12 Vict. c. 92; 13 & 14 Vict. c. 88; 26 & 27 Vict. c. 114 (*p*);

657; Watts *v.* Lucas, ib., 6 Q. B. 226; Gore *v.* Commissioners, ib. 561; Holford *v.* George, ib., 3 Q. B. 639; Garnett *v.* Whyte, ib. 699). See also 24 & 25 Vict. c. 96, ss. 24—26, as to *stealing* or *unlawfully destroying* fish, and 26 & 27 Vict. c. 10, as to *exportation* of salmon.

(*n*) 16 & 17 Vict. c. 107, s. 49.

(*o*) The 7 Geo. 4, c. 34, and some of the provisions of 1 & 2 Geo. 4, c. 79, and of 5 Geo. 4, c. 64, were repealed by 31 & 32 Vict. c. 45. The curing of *herrings* is regulated by 14 & 15 Vict. c. 26.

(*p*) Continued by 31 & 32 Vict. c. 111.

28 & 29 Vict. c. 119; 29 & 30 Vict. c. 45; and 32 & 33 Vict. c. 92;—and by these almost all the former statutes on that subject are repealed, and their provisions consolidated and amended.

Lastly, that in the year 1867, a convention having been entered into between her Majesty and the then Emperor of the French concerning the fisheries in the seas adjoining the British Islands and France, provisions to carry into effect such of the arrangements thereof as required the confirmation of the legislature, are contained in the 31 & 32 Vict. c. 45 (*q*). Treaties also exist between her Majesty and the United States of America, relating *inter alia* to the rights of fishery as between the British North American colonies and the United States; and such treaties were carried into effect by the 18 & 19 Vict. c. 3, and the 35 & 36 Vict. c. 45 (*r*).

(*q*) By this Act the 6 & 7 Vict. c. 79, and 18 & 19 Vict. c. 101, are repealed.

(*r*) This Act carries into effect the treaty which was signed at Washington, 8 May, 1871.

CHAPTER IX.

OF THE LAWS RELATING TO THE SANITARY CONDITION OF THE PEOPLE.

THE attention of the legislature has, from the reign of James the first, been at various times directed to the subject of pestilent and contagious disease; and to the establishment of such precautions as human knowledge and sagacity may devise for averting its course or mitigating its effects.

The enactments which were introduced in reference to this matter, had principally in view the Plague, and afterwards the particular maladies of Cholera, and Small-pox; but sanitary regulations of a far more general character have, within a recent period, been copiously established.

With respect to *Plague*, very stringent enactments were made by 1 Jac. I. c. 31;—under which indeed it was a capital felony for any person having an infectious sore upon him uncured to go abroad and converse in company, after being commanded by the proper authority to keep his house. The necessity, however, of any regulations adapted to an actual prevalence of plague among us, has been long since at an end,—no disease of the kind having been known in this island for more than 200 years past; and the statute of James on this subject was repealed in the reign of her present Majesty (*a*).

But besides this Act, our statute book contains several of which the object is not so much to regulate the con-

(*a*) 7 Will. 4 & 1 Vict. c. 91, s. 4.

duct of infected persons during the prevalence of contagious disease, as to prevent its introduction from foreign parts.

We here refer to the laws relating to *quarantine*; the term applied to that period of probation during which vessels which arrive from countries infected with plague, or other contagious disorder, are restrained by law from general intercourse (*b*).

The first statute on the subject was 9 Ann. c. 2, which was followed by several others in the reigns of George the first and George the second; but all previous provisions were repealed by 6 Geo. IV. c. 78, which consolidates the whole law now in force with respect to quarantine.

By this statute it is enacted, that all vessels, as well of war as others, coming from any place whence the crown, by the advice of the privy council, shall have adjudged it probable that the plague or other infectious disease of a highly dangerous kind may be brought; and all vessels and boats receiving persons or goods out of the same; and all persons and goods on board the vessels so arriving, or so receiving as aforesaid;—shall be liable to "quarantine" within the meaning of the Act, and of any order or orders in council concerning quarantine: and shall be obliged to perform quarantine in such place or places (known by the name of *lazarets*), for such time, and in such manner, as shall from time to time be directed by order in council, notified by proclamation or published in the London Gazette; and, until they shall have been discharged from such quarantine, shall not come on shore, or be put on board any other vessel or boat, except in such cases, and by such licence, as the order in council may direct (*c*). And in case of breach of quarantine, either as to persons or

(*b*) The earliest known regulations in the nature of quarantine laws are those contained in an edict of Justinian, A.D. 542. In modern times the example has been followed in all the principal countries of Europe.

(*c*) 6 Geo. 4, c. 78, s. 2.

goods, the offender is visited with heavy fine, and is besides punishable with imprisonment for six months (*d*). But, on the other hand, the privy council are empowered, if they shall think fit, to shorten in any individual case the period of quarantine; or absolutely release therefrom any particular vessels, persons, or goods (*e*).

Besides many other regulations contained in this statute, too minute to be here set forth, it is provided, that the lords of the privy council, or any two of them, may make such order as they shall think necessary upon any unforeseen emergency, or in any particular case, with respect to any vessel or goods arriving with infectious disease on board, or arriving under any suspicious circumstances as to infection; and this, although such vessels shall *not* have come from any place from which the crown has declared it probable that the plague or other disease may be brought (*f*). And a similar power is, by the same Act, entrusted to the privy council in the case of any infectious disease or distemper breaking out in the united kingdom; so as to enable them to cut off communication between persons afflicted therewith and the rest of the subjects of the realm (*g*).

Again, the visitation of this kingdom by the spasmodic or Asiatic *cholera*, gave occasion in the year 1832 to a statute (2 Will. IV. c. 10), by which the privy council were empowered to issue such orders as might appear expedient, with a view to prevent the spread of this fearful disease; for the relief of persons afflicted thereby; and for the interment of those who became its victims. And by the 3 & 4 Will. IV. c. 75, this Act was continued until the end of the then next session of parliament. But at the expiration of that period the cholera having wholly disappeared, the Act was not further continued; and though some partial outbreaks of the epidemic have since occurred, the statute has not been re-enacted,—having

(*d*) 6 Geo. 4, c. 78, ss. 17, 26.
(*e*) Sect. 6.
(*f*) Sect. 6.
(*g*) Ibid.

indeed become unnecessary by the establishment of those more general provisions for the prevention of disease, of which we shall presently give some account (*h*).

With regard to *Small-pox*, in order to prevent so far as possible the ravages of that terrible malady, it has been thought fit to prohibit its voluntary production by way of inoculation (a practice which at one time was not unfrequently adopted), and also to institute throughout the country a system of compulsory vaccination. Accordingly, by the statutes now in force on this subject, viz. "The Vaccination Act, 1867" (30 & 31 Vict. c. 84), and "The Vaccination Act, 1871" (34 & 35 Vict. c. 98), the guardians of every union or parish which has not already been divided into vaccination districts, are required to make such division forthwith; and are to enter into a contract with some duly registered medical practitioner for the vaccination of all persons residing in each district, who shall be termed its public vaccinator (*i*).

To such public vaccinator, or else to some other medical practitioner, it is made incumbent on every parent (or other person having the custody of a child) to take his child, within three months after its birth, for the purpose of being vaccinated; and he must moreover (in the case of a public vaccination) repeat his visit at the expiration of a week, that the vaccinator may ascertain that the operation was successful; and in case of a private vaccination a certificate must be procured by the parent himself and transmitted to the vaccination officer. And every parent (or other person) who shall neglect to perform these duties shall be liable to a penalty of twenty shillings on a summary conviction (*k*); while any person who shall by any means attempt to produce in any form the disease of

(*h*) Vide post, p. 174.

(*i*) By 30 & 31 Vict. c. 84, the prior enactments on this subject contained in 3 & 4 Vict. c. 29; 4 & 5 Vict. c. 32; 16 & 17 Vict. c. 100; 21 & 22 Vict. c. 25, s. 7, and 24 & 25 Vict. c. 59, are repealed.

(*k*) 30 & 31 Vict. c. 84, s. 29. (See Pilcher *v.* Stafford, 4 B. & S. 775.)

small-pox by variolous matter or otherwise, shall be liable on a summary conviction to be imprisoned for any term not exceeding one month (*l*).

It is moreover provided that any justice of the peace, on being satisfied that a child under the age of fourteen has not been vaccinated, nor has already had the small-pox, may make an order on the parent that such child shall be vaccinated within a certain time, under the penalty of twenty shillings in case of neglect (*m*).

As for the general provisions tending to the preservation and improvement of the public health to which we referred at the beginning of this chapter, they have issued from the legislature, during the last few years, with a profusion that makes it impossible to enter into a full detail of them, without allotting more space to the particular subject than the plan of this work permits. We can only advert to such as are of a more directly sanitary character; and which relate either to the public health in general, or more particularly to the removal of nuisances.

Firstly. By 11 & 12 Vict. c. 63 (called "The Public Health Act, 1848"), on the petition of a certain proportion of the rated inhabitants of any town, parish or other place with a known and defined boundary, an official inspector was directed to examine into the facts, and if he reported in favour of the petition, the Act was then applied to such place—in some cases, by order in council; in others, under the authority of parliament (*n*). And by a subsequent Act, viz. the 21 & 22 Vict. c. 98 (called "The Local Government Act, 1858"), the previous statute was amended; and (among other points) in this important particular—that the sanitary arrangements and internal management of any place already subject to or adopting

(*l*) 30 & 31 Vict. c. 84, s. 32.

(*m*) Sect. 31. (See Allen, app., Worthy, resp., Law Rep., 5 Q. B. 163; Dutton, app., Atkins, resp., ib.; 6 Q. B. 373.)

(*n*) See an act of parliament for such purpose, 20 & 21 Vict. c. 22.

"The Public Health Act, 1848,") was thenceforth committed to its *local authorities*, instead of (as previously) to a central Board established in London.

The 21 & 22 Vict. c. 98 was, in its turn, afterwards amended by the 24 & 25 Vict. c. 61, called "The Local Government Act (1858) Amendment Act, 1861;" and, again, by the 26 & 27 Vict. c. 17, called "The Local Government Act Amendment Act, 1863." The system which prevails in those places to which the above Acts apply (*o*) is consequently to be ascertained by collating the provisions of the 11 & 12 Vict. c. 63; the 21 & 22 Vict. c. 98; the 24 & 25 Vict. c. 61; and the 26 & 27 Vict. c. 17;—a group of statutes which, taken collectively, are called "The Local Government Acts" (*p*).

In any place in which the "Local Government Acts" are in force, the duty of carrying them into execution devolves upon a "Local Board of Health," which as regards corporate boroughs is to be the town council, and as regards other places is to be elected by the owners and ratepayers. And this local Board is charged with a great variety of duties, and is clothed with corresponding powers of a very miscellaneous character—including the subjects of sewerage; scavenging and cleansing streets; buildings; the repair of the highways within the district; the control of streets and roads; the supply of water, and a variety of other matters more or less closely connected with the sanitary improvement of the place (*q*). It has, further, the power to borrow money, purchase land and settle boundaries, and procure the repeal of local Acts (*r*). And the expenses connected with all these duties are to be defrayed out of local rates, to be made either pro-

(*o*) See The Queen *v.* Hardy, Law Rep., 4 Q. B. 117.

(*p*) They are thus defined in the Public Health Act, 1872 (35 & 36 Vict. c. 79), for the purposes of that statute.

(*q*) By 25 & 26 Vict. c. 61, s. 7, no highway district, formed under that Act, is to include (among other places excepted) any district constituted under 11 & 12 Vict. c. 63, or 21 & 22 Vict. c. 98.

(*r*) 21 & 22 Vict. c. 98, s. 75. See such an Act, 25 & 26 Vict. c. 25.

spectively or retrospectively, and to be levied in general on the occupiers of property liable to the poor rate (*x*).

Secondly. By 18 & 19 Vict. c. 116, called "The Diseases Prevention Act, 1855" (amended by 23 & 24 Vict. c. 77, ss. 10—12), it was provided, that from time to time official inquiries might be set on foot as to matters concerning the public health; and that when any part of England appeared to be threatened with, or to be affected by, any formidable epidemic, endemic, or contagious disease, the Act might be directed to be there put in force: and while so in force the place should be under special regulations for speedy interments; for visitation from house to house; and for the dispensing of medicines, guarding against the spread of disease, and providing such medical aid and accommodation as might be required. And the execution of all such directions was directed to belong to the "local authority for executing the Act;" that is to say, to the guardians and overseers of each parish (*y*).

Thirdly. By 18 & 19 Vict. c. 121 (*z*), called "The Nuisances Removal Act for England, 1855" (*a*), it was enacted, that the "local authority" established for the execution of that Act,—that is, in general, the "Local Board of Health" of the place wherever such a body exists (*b*),—shall appoint, or join with other local autho-

(*x*) See 23 Vict. c. 16, s. 12.

(*y*) 23 & 24 Vict. c. 77, s. 11. As to the local authorities for preventing diseases in the *metropolis*, see 18 & 19 Vict. c. 120; 23 & 24 Vict. c. 77, s. 10.

(*z*) This Act repeals (so far as they relate to England) the 11 & 12 Vict. c. 123, and 12 & 13 Vict. c. 111, on the same subject. There had been a previous Act of 9 & 10 Vict. c. 96, which expired in 1848. As to the construction of 18 & 19 Vict. c. 121, see The Queen *v.* Cotton, 1 E. & E. 203.

(*a*) This Act was amended in certain of its provisions by 23 & 24 Vict. c. 77, ss. 1—9; 26 & 27 Vict. c. 117; 29 & 30 Vict. c. 41, and the second part of 29 & 30 Vict. c. 90; which last statute is called "The Sanitary Act, 1866."

(*b*) As to a Local Board of Health, vide sup. p. 173. In any place where there is no such Board, other local authorities for the re-

rities in appointing, for each place a "Sanitary Inspector" or "Inspectors." The duties of such inspectors are to attend at the office of the Board and their meetings; to enter their minutes and keep their accounts; to examine into the state of facts with regard to nuisances (*c*); and generally to fulfil the instructions of the Board as the occasion may arise. The local authority and their officers are empowered to examine any premises as to which any suspicion of nuisance exists or complaint is made (*d*); and to inspect all articles of food exposed for sale or in the course of carriage or preparation for sale or use (*e*). And they may also summon any offender before two justices of the peace in petty sessions, and obtain an order requiring the abatement or discontinuance of any nuisance that may have been found on such premises; or for the destruction of any article of food so examined, which the justices may deem unfit for the food of man (*f*).

Fourthly. The carrying out of the Public Health Act, 1848, was originally entrusted to "the General Board of

moval of nuisances are appointed by the 23 & 24 Vict. c. 77, according to the following order:—The Town Council; the Trustees or Commissioners under Local Improvement Acts; and lastly, the Guardians or Overseers;—each of the three bodies above mentioned being in turn the local authority, in case of the non-existence of the body next before it in the series. There is, however, a proviso that, in certain cases, the local authority may be the "Highway Board," or the "Nuisances Removal Committee," of the place (if there were such bodies acting when that Act passed), but only so long as they continue to employ sanitary inspectors. As to the *metropolis*, see 18 & 19 Vict. c. 120; 23 & 24 Vict. c. 77, s. 6.

(*c*) In 18 & 19 Vict. c. 121, s. 8, a description is given of the different "nuisances" which are to be deemed as falling within the statute.

(*d*) See Cocker *v.* Cardwell, Law Rep., 5 Q. B. 15.

(*e*) See Young *v.* Grattridge, Law Rep., 4 Q. B. 166.

(*f*) 18 & 19 Vict. c. 121, ss. 12—27. And see Ex parte the Mayor of Liverpool, 8 Ell. & Bl. 537; The Queen *v.* Cotton, 1 E. & E. 203; Amys *v.* Creed, Law Rep., 4 Q. B. 122. As to the funds out of which the expenses which may attend the proceedings of the local authority are to be defrayed, see 23 & 24 Vict. c. 77, s. 4.

Health," which, however, ceased to exist in the year 1858, and some of its duties were then transferred to the secretary of state for the Home Department and others to the Privy Council; which last had always had the jurisdiction of carrying out the provisions of the Diseases Prevention Act, 1855. But in the year 1871, it was considered desirable to concentrate in a single department of the government the supervision of the laws relating to the public health, to the relief of the poor, and to local government. And, accordingly, by 34 & 35 Vict. c. 70 there was established "The Local Government Board," to which by the same statute was transferred all the powers and duties not only of the Poor Law Board—which then ceased to exist as we have already had occasion to mention (*g*),—but also such as had previously been vested or imposed in the secretary of state for the Home Department, (or in the Privy Council,) in reference to the "Local Government Acts" and "The Diseases Prevention Act, 1855," as well as to some other statutes enumerated in the schedule of the 34 & 35 Vict. c. 70,—all of them having more or less connection with sanitary matters and local improvements.

Fifthly. Since the establishment of the Local Government Board just mentioned, an Act has passed to again amend the law relating to public health, viz., the 35 & 36 Vict. c. 79, called "The Public Health Act, 1872" (*h*).

The general plan of this statute (which does not, except in certain of its provisions, apply to the metropolis) is to divide England into *urban sanitary districts* and *rural sanitary districts;* the first consisting of all boroughs (*i*), improvement Act districts (*k*), and local government dis-

(*g*) Vide sup. p. 49.

(*h*) This Act has been amended as to *Cambridge* by 36 & 37 Vict. c. 73.

(*i*) That is to say, any place subject to the Municipal Corporation Acts (35 & 36 Vict. c. 79, s. 60).

(*k*) That is to say, any area sub-

tricts (*l*); and the second consisting of such poor law unions as are not coincident in area with, or wholly included in, an urban district (*m*).

Each urban district is to be subject to local authorities called "urban sanitary authorities," and each rural district to "rural sanitary authorities;" and subject to the provisions of the Act, the "Local Government Acts" are to be deemed in force within the district of every *urban* sanitary authority; to whom shall be transferred and attach, to the exclusion of any other previous authority, all the powers, rights and duties of a "local board" under the Local Government Acts, of the "nuisance authority" under the Nuisances Removal Act, and of the authorities under such other Acts as are specified in the statute (*n*). And there shall be transferred and attach to a *rural* sanitary authority, to the exclusion of any previous authority, all the powers, rights and duties of the authority under the Nuisances Removal Acts and the Diseases Prevention Act, and under such other Acts as are specified in the statute (*o*).

It forms an important provision of this new Act, and the only one which we shall here specify, that every rural and urban sanitary authority shall appoint from time to time a legally qualified medical officer of health, who shall be under the general superintendence and control of the Local Government Board; by whose authority his qualification, appointment, duties, salary and term of office

ject to the jurisdiction of any commissioners, trustees or other persons invested by any local Act with powers of town government and rating. (35 & 36 Vict. c. 79, s. 60.)

(*l*) That is to say, any area subject to the jurisdiction of a "local board," under the Local Government Acts. (Ibid.)

(*m*) Sect. 5.

(*n*) Sect. 7. Viz., the Sewage Utilization Acts, the Common Lodging Houses Acts, the Artizan and Labourers Dwelling Acts, the Bakehouse Regulation Act, the Baths and Washhouses Act, and the Labouring Classes Lodging Houses Acts. (Ibid.)

(*o*) Viz., the Sewage Utilization Acts, the Common Lodging Houses Acts, and the Bakehouse Regulation Act. (35 & 36 Vict. c. 79, s. 9.)

shall be regulated (*p*); and that every sanitary authority has the power to direct the destruction of any bedding, clothing or other articles which have been exposed to infection from any dangerous infectious disorder and to give compensation for the same (*q*).

(*p*) 35 & 36 Vict. c. 79, s. 10. (*q*) Sect. 51.

In addition to the statutes of which some account is given in the text of this chapter, there are the following enactments more or less immediately connected with the subject of the sanitary condition of the people.

Alkali Works.—26 & 27 Vict. c. 124; 31 & 32 Vict. c. 36; 35 & 36 Vict. c. 79, s. 35.

Arsenic (sale of).—14 & 15 Vict. c. 13.

Bakehouses.—26 & 27 Vict. c. 40.

Baths.—9 & 10 Vict. c. 74; 10 & 11 Vict. c. 61.

Burials.—17 & 18 Vict. c. 87; 18 & 19 Vict. c. 79; c. 105, ss. 11—13; c. 128; 20 & 21 Vict. c. 81; 21 & 22 Vict. c. 98, s. 49; 22 Vict. c. 1; 23 & 24 Vict. c. 64; 24 & 25 Vict. c. 61, s. 21; 25 & 26 Vict. c. 100; 34 & 35 Vict. c. 33.

Cattle, (Contagious Disorders among).—26 & 27 Vict. c. 95; 28 & 29 Vict. c. 119; 29 & 30 Vict. c. 102; 31 & 32 Vict. c. 111; 32 & 33 Vict. c. 70; 36 & 37 Vict. c. 75.

Contagious (Venereal) Diseases at certain Naval and Military Stations.—29 & 30 Vict. c. 35; 31 & 32 Vict. c. 80; 32 & 33 Vict. c. 96.

Factories, &c.—42 Geo. 3, c. 73; 3 & 4 Will. 4, c. 103; 4 & 5 Will. 4, c. 1; 7 & 8 Vict. c. 15; 9 & 10 Vict. c. 40; 10 & 11 Vict. c. 29; 13 & 14 Vict. c. 54; 16 & 17 Vict. c. 104; 19 & 20 Vict. c. 38; 24 & 25 Vict. c. 117; 27 & 28 Vict. c. 48; 30 & 31 Vict. c. 103; 33 & 34 Vict. c. 62; 34 Vict. c. 19; 34 & 35 Vict. c. 104.

Gas.—22 & 23 Vict. c. 66; 23 & 24 Vict. c. 146.

Lodging Houses and Dwellings.—14 & 15 Vict. cc. 28, 34; 16 & 17 Vict. c. 41; 18 & 19 Vict. c. 121, s. 43, c. 132; 31 & 32 Vict. c. 130.

Mines.—35 & 36 Vict. cc. 76, 77.

Public Walks, &c.—23 & 24 Vict. c. 30.

Sewers.—23 Hen. 8, c. 5; 3 & 4 Edw. 6, c. 8; 13 Eliz. c. 9; 3 & 4 Will. 4, c. 22; 4 & 5 Vict. c. 45; 12 & 13 Vict. c. 50; 24 & 25 Vict. c. 133; 28 & 29 Vict. c. 75; 29 & 30 Vict. c. 90, Part I.; 30 & 31 Vict. c. 113; 31 & 32 Vict. c. 115.

Workshops.—30 & 31 Vict. c. 146; 34 Vict. c. 19; 34 & 35 Vict. c. 104.

There are also the following Acts containing enactments of the same general character having regard to the *Metropolis.*

As to the Local Management of the Metropolis.—18 & 19 Vict. c. 120

(amended by 19 & 20 Vict. c. 112; 21 & 22 Vict. c. 104, and 25 & 26 Vict. c. 102; 32 & 33 Vict. c. 102).

Building Act.—18 & 19 Vict. c. 122 (amended by 23 & 24 Vict. c. 52; 24 & 25 Vict. c. 87; 32 & 33 Vict. c. 82; 34 Vict. c. 39).

Burials.—15 & 16 Vict. c. 85; 16 & 17 Vict. c. 134; 20 & 21 Vict. cc. 35, 81.

Gas.—23 & 24 Vict. c. 125; 34 Vict. c. 41.

Regulation of Traffic.—30 & 31 Vict. c. 134; 31 Vict. c. 5.

Relief of Poor.—27 & 28 Vict. c. 116; 28 & 29 Vict. c. 34; 30 & 31 Vict. c. 6; 32 & 33 Vict. c. 63.

Sewers.—18 & 19 Vict. c. 120; 21 & 22 Vict. c. 104; 25 & 26 Vict. c. 102.

Smoke Furnaces.—16 & 17 Vict. c. 128; 18 & 19 Vict. c. 121, s. 43; 19 & 20 Vict. c. 107.

Water.—15 & 16 Vict. c. 84; 34 & 35 Vict. c. 113.

CHAPTER X.

OF THE LAWS RELATING TO PUBLIC CONVEYANCES.

IT has been the policy of the legislature of this country to exercise, over this department of social economy, merely a general supervision; and to trust to the enterprise of individuals or associations, for providing for the welfare and convenience of the public in this important particular.

In our treatment of it, we shall distribute the subject under the following heads: I. Stage Coaches. II. Railways. III. Conveyances by Water.

I. The provisions relative to *stage coaches* in general (*a*), will be found embodied in 2 & 3 Will. IV. c. 120:—amended by 3 & 4 Will. IV. c. 48; 2 & 3 Vict. c. 66; and 5 & 6 Vict. c. 79.

By the first of these Acts, a "stage carriage" is determined to be every carriage, (whatever be its form or construction,) which is drawn by animal power (*b*); and used

(*a*) The provisions relating to hackney coaches in London, and to "Metropolitan Stage Carriages," (which last term, according to 6 & 7 Vict. c. 86, comprises "any stage "carriages except such as shall, on "every journey, go to or come from "some town or place beyond the "limits of the city of London and "the liberties thereof and Metropolitan Police District,") are not noticed in the text, their character being merely local. But they will be found in 1 & 2 Will. 4, c. 22; 6 & 7 Vict. c. 86; 13 & 14 Vict. c. 7; 16 & 17 Vict. cc. 33, 127; 30 & 31 Vict. c. 134; 31 Vict. c. 5; and 32 & 33 Vict. c. 115 (and see Case, app. Storey, resp., Law Rep., 4 Exch. 319; Clarke *v.* Stanford, ib. 6 Q. B. 357; Bocking *v.* Jones, ib. 6 C. P. 29; Allen *v.* Tunbridge, ib. 481).

(*b*) There are also statutes (24 & 25 Vict. c. 70; 28 & 29 Vict. c. 83; and 36 & 37 Vict. c. 75), regulating the use of *locomotives* (or engines drawing or propelling carriages) on roads; and 33 & 34 Vict. c. 78, to facilitate the construction and regulate the working of *tramways*.

for the purpose of conveying passengers for hire, to and from any place in Great Britain; and travelling at the rate of three miles or more in the hour; and for which separate fares shall be charged to separate passengers (*c*).

No carriage is to be kept for this purpose, unless the person who keeps it has a licence from the Board of Inland Revenue, which must be yearly renewed, and in respect of which certain duties are made payable (*d*); nor unless there be on the carriage such numbered plates and particulars as are directed by the Acts; and these particulars specify the christian and surname of the proprietor, or one of the proprietors; the extreme places to which the licence extends; and the greatest number of inside and outside passengers which the carriage may lawfully convey (*e*).

Numerous penalties are imposed on those in charge of these carriages, for offences or acts of negligence which would seem to militate against the safety or convenience of the public. Among these may be mentioned—driving a stage coach without or with a defective licence, or without having such plates and particulars as above referred to (*f*); carrying too many passengers or too much luggage (*g*); intoxication, negligence, or furious driving; and in short, any misconduct, either in the driver or conductor, which shall endanger the safety or the property of any person (*h*).

(*c*) 2 & 3 Will. 4, c. 120, s. 5.

(*d*) Sect. 6. These duties form part of the excise; 10 & 11 Vict. c. 42, s. 2, and 32 & 33 Vict c. 14, s. 7.

(*e*) 2 & 3 Will. 4, c. 120, s. 36; 5 & 6 Vict. c. 79, ss. 11, 13, 14. As to *mail* coaches, and how far they are excepted, see 2 & 3 Will. 4, c. 120, s. 46; 5 & 6 Vict. c. 79, s. 12.

(*f*) 2 & 3 Will. 4, c. 120, ss. 30—36; 5 & 6 Vict. c. 79, s. 14.

(*g*) 3 & 4 Will. 4, c. 48, ss. 2, 3, 4; 5 & 6 Vict. c. 79, s. 15.

(*h*) 2 & 3 Will. 4, c. 120, s. 48. It may be here observed that wanton or furious driving, racing or other wilful misconduct or neglect on the part of a person in charge of *any* carriage (whether a stage carriage or otherwise), when followed by any bodily harm to any person, is a *misdemeanor*, punishable by imprisonment to the extent of two years, and with or without hard labour. (24 & 25 Vict. c. 100, s. 35.)

Besides all which, it is provided, that if it shall happen that the driver, conductor, or guard of a stage carriage, shall have committed any offence against that Act, but is not known,—or being known, cannot be found,—the *proprietor* shall be liable to the same penalty as if he had been driver when the offence was committed (*h*). But it will be a sufficient answer to the charge if he can prove by evidence other than his own testimony, to the satisfaction of the justice of the peace before whom the complaint is heard, that the offence was committed without his privity or knowledge, and that he has derived no benefit therefrom; and that he has moreover, used his endeavour to find out such driver, conductor, or guard, and given all reasonable information in answer to inquiries respecting him (*i*).

II. *Railways.*

Besides the special Acts from time to time passed which authorize the construction of particular railways,—and in most of which are incorporated the "Railway Clauses Consolidation Act, 1845" (8 & 9 Vict. c. 20), and also, in the case of special Acts passed after July, 1863, the "Railway Clauses Act, 1863" (26 & 27 Vict. c. 92),—there exist the following statutes affecting railways in general: 1 & 2 Vict. c. 98; 3 & 4 Vict. c. 97; 5 & 6 Vict. c. 55; 7 & 8 Vict. c. 85; 8 & 9 Vict. cc. 42, 96; 9 & 10 Vict. c. 57; 12 & 13 Vict. c. xl; 13 & 14 Vict. c. xxxiii; 13 & 14 Vict. c. 83; 14 & 15 Vict. c. 64; 15 & 16 Vict. cap. c; 17 & 18 Vict. c. 31; 22 & 23 Vict. c. 59; 24 & 25 Vict. c. 97, ss. 35—38; c. 100, ss. 32—34; 29 & 30 Vict. c. 108; 30 & 31 Vict. c. 127; 31 Vict. c. 18; 31 & 32 Vict. cc. 79, 119; 32 & 33 Vict. c. 114 (*j*); 33 Vict.

(*h*) 2 & 3 Will. 4, c. 120, s. 49. As to the production of the driver, &c. by the proprietor, see also 6 & 7 Vict. c. 86, s. 35; 12 & 13 Vict. c. 92, s. 22.

(*i*) 2 & 3 Will. 4, c. 120, s. 49.

(*j*) See Re Brampton and Longtown Railway Company, Law Rep., 10 Eq. Ca. 613.

c. 19; 34 & 35 Vict. c. 78; 35 & 36 Vict. c. 50; and 36 & 37 Vict. cc. 48, 76 (*k*).

Under these statutes, the general supervision and regulation of all railways is entrusted to the Board of Trade (*l*); and it is made unlawful to open any railway, or portion of railway, for the public conveyance of passengers, until one month's notice in writing shall have been given to such Board, by the company to whom the railway may belong, of its intention to open the same for such traffic; and ten days' notice of the time when the railway will be complete and ready for their inspection (*m*).

It is further enacted, by the statutes above mentioned, that the Board of Trade may postpone the opening of any railway, until satisfied that the public may use the same without danger; and may order every railway company to make returns to them of the aggregate traffic in passengers, cattle, and goods, of the occurrence of any serious accident, and of all tolls and rates from time to time levied (*n*). The Board may also appoint proper persons as inspectors of railways (*o*).

Every railway company (whether specially called upon to do so by such order or not) must report to the Board of Trade every accident attended with serious personal injury, within forty-eight hours of its occurrence (*p*); and is required to lay before the Board for its approbation certified copies of the bye-laws and regulations by which it is governed (*q*): which bye-laws may be sanctioned or disallowed by the Board at its pleasure. And the Board is moreover empowered to direct the attorney-general to

(*k*) Of the above Acts, the 3 & 4 Vict. c. 97; 5 & 6 Vict. c. 55; 7 & 8 Vict. c. 85; and 34 & 35 Vict. c. 78, are known as "The Regulation of Railways Acts, 1840—1871."

(*l*) But by 36 & 37 Vict. c. 48, s. 9, certain of the powers and duties of the Board of Trade in relation to railways are transferred to the Railway Commissioners appointed under that Act.

(*m*) 5 & 6 Vict. c. 55, ss. 4, 5.

(*n*) 3 & 4 Vict. c. 97, s. 3; 5 & 6 Vict. c. 55, s. 8.

(*o*) 3 & 4 Vict. c. 97, s. 5; 7 & 8 Vict. c. 85, s. 15.

(*p*) 5 & 6 Vict. c. 55, s. 7.

(*q*) 3 & 4 Vict. c. 97, ss. 7, 8.

proceed against any railway company for non-compliance with the provisions either of their special Act, or of the Acts of general regulation; or on their commission of any act unauthorized by law (*r*).

Provisions are also made to regulate the liability of a railway company for neglect or default in the carriage of goods (*s*); to authorize the summary apprehension and punishment of any engine-driver or servant of the company guilty of any misconduct (*t*); and to subject to severe punishment all ill-disposed persons obstructing or injuring any railway engine or carriage, or endangering the safety of the passengers (*u*).

Railway companies (amongst other obligations) are required to maintain and repair good and sufficient fences along their lines (*x*); to transport, at a settled rate, military and police forces (*y*), and mails (*z*); to afford all reasonable facilities for the conveyance of traffic, without undue preference of particular persons or companies, or particular descriptions of traffic (*a*); to permit and faci-

(*r*) 7 & 8 Vict. c. 85, ss. 16—18.

(*s*) See 8 & 9 Vict. c. 20, s. 89; 14 & 15 Vict. c. 19, ss. 6, 8, 10; 17 & 18 Vict. c. 31, s. 7; 31 & 32 Vict. c. 129, ss. 14—21, et vide sup. vol. II. p. 88, n. (*e*).

(*t*) 3 & 4 Vict. 97, ss. 13, 14; 5 & 6 Vict. c. 55, ss. 17, 18.

(*u*) 24 & 25 Vict. c. 97, ss. 35—38; c. 100, ss. 32—34. By c. 95, the previous provisions on this subject contained in 3 & 4 Vict. c. 97, and 14 & 15 Vict. c. 19, are repealed.

(*x*) 5 & 6 Vict. c. 55, s. 10.

(*y*) Sect. 20; 7 & 8 Vict. c. 85, s. 12.

(*z*) 1 & 2 Vict. c. 98; 7 & 8 Vict. c. 85, s. 11.

(*a*) 17 & 18 Vict. c. 31, ss. 1—6. By this Act of 17 & 18 Vict. c. 31, called "The Railways and Canal Traffic Act, 1854," it is made lawful for any company or person to make complaint in respect of any thing done or omitted to be done by any railway company in violation of the Act; and, if necessary, a writ of injunction or interdict may be issued to restrain the company from any further violation of it. This Act invested the Common Pleas with exclusive jurisdiction to carry out its provisions; but by 36 & 37 Vict. c. 48, a special tribunal has been now established for this purpose, viz., three paid commissioners (styled "The Railway Commissioners") and two assistant commissioners, with power to make general rules of procedure. These commissioners (whose powers are considerably more extensive than

litate the introduction of electrical telegraphs upon their lines (*b*); to keep a strict account of money received for the conveyance of passengers, or from other sources, upon their respective lines; to deliver the same to the Board of Inland Revenue; and to pay a monthly duty thereupon (*c*).

By one of the statutes above mentioned, viz. 7 & 8 Vict. c. 85, it is provided, that if,—at any time after twenty-one years from the passing of the special Act for any passenger railway established after the year 1844,—the average divisible profits for three successive years upon the paid-up capital stock of such passenger railway company shall be found to equal or exceed 10*l.* per cent., the Lords of the Treasury shall be at liberty, (an act of parliament being first obtained for that purpose,) to revise and reduce the fares, upon condition of giving the company a guarantee to make good their profits to the amount of 10*l.* per cent. during the existence of such reduced scale. The Treasury is also enabled, after the same period, to purchase any such railway on behalf of her Majesty, whatever may be the rate of divisible profits which may have been earned thereon (*d*). By the same Act passenger railway companies are also, in general, required to secure to the poorer class of travellers the means of travelling by railway at moderate fares and in carriages protected from the weather (*e*). By the same

those given by the Act of 1854) are to make an annual report of their proceedings, which is to be laid before parliament.

(*b*) 7 & 8 Vict. c. 85, ss. 14, 15. As to maliciously injuring such telegraphs, see 24 & 25 Vict. c. 97, ss. 37, 38. As to their purchase by government, see 31 & 32 Vict. c. 110.

(*c*) 5 & 6 Vict. c. 79, s. 4; 10 & 11 Vict. c. 42.

(*d*) 7 & 8 Vict. c. 85, ss. 1—4. The sum to be paid for the railway is to be at the rate of *twenty-five years'* purchase of the average profits for the preceding three years; but, if such profits are less than 10*l.* per cent. and the company is dissatisfied, the price is to be settled by arbitration. (Sect. 3.)

(*e*) The rate of fare for third-class passengers by the cheap or government trains thus provided is

statute they are, moreover, prohibited from raising loans for the future on negotiable securities, except as authorized by parliamentary enactment (*g*); and by 8 & 9 Vict. c. 16, ss. 38—55, a variety of additional regulations are made in regard to the case of their borrowing money on bond or mortgage (*h*).

We may also specifically notice two other of the group of statutes above cited. In the 30 & 31 Vict. c. 127, there are to be found a variety of provisions as to the position of railway companies, in regard to their financial arrangements and the protection of their creditors on the one hand and the shareholders on the other, in case of their being unable to meet their engagements (*i*). And the 31 & 32 Vict. c. 119, deals with the accounts of companies and the protection of their shareholders by inspection, and a proper system of audits; while it also contains a variety of provisions to secure the safety and comfort of the general public. Of these clauses we can only refer here to the important regulation that in every passenger train which travels more than twenty miles without stopping, there shall be provided such sufficient means of communication between the passengers and the servants

not to exceed *one penny* per mile. See also on this subject 21 & 22 Vict. c. 75, made perpetual by 23 & 24 Vict. c. 41.

(*g*) 7 & 8 Vict. c. 85, s. 19.

(*h*) As to the legal remedy on the mortgage debenture and bonds of railway companies, see Hart *v.* Eastern Union Railway Company, 7 Exch. 246; Virtue *v.* East Anglian Railway Company, 6 Railway Cases, 252; Prince *v.* Great Western Railway Company, 16 Mee. & W. 244; Shelford on the Law of Railways, pp. 157—161, 3rd edit. See also 28 & 29 Vict. c. 78, and 33 & 34 Vict. c. 20; "The Mortgage Debenture Acts, 1865, 1870."

(*i*) General Orders under this Act were issued on the 24th January, 1868. See also the following cases: In re Cambrian Railway Company's Scheme, Law Rep., 3 Ch. App. 278; In re Potteries, Shrewsbury and North Wales Railway Company, ib., 5 Ch. App. 67; In re Devon and Somerset Railway Company, ib., 6 Eq. Ca. 615; In re Bristol and North Somerset Railway Company, ib. 448; In re East and West Junction Railway Company, ib., 8 Eq. Ca. 87.

of the company in charge of the train, as the Board of Trade shall approve (*j*).

III. *Conveyances by water.*

The class of legislative provisions that require to be noticed under this head, are those which relate to the carriage of passengers in merchant vessels (*k*).

And, first, as to *steamers*, it is provided by the Merchant Shipping Acts (*l*), that every "passenger steamer"—that is, "every British steam-ship carrying passengers to, from, "or between any place or places in the united kingdom, "excepting steam ferry-boats working in chains, commonly "called steam bridges,"—shall be surveyed and reported upon to the Board of Trade at least once in the year (*m*); and shall proceed on no voyage with passengers, unless the owner or master has received from the board a certificate applicable to the voyage, and showing that the provisions of the Acts have been complied with (*n*). And if the person in charge receives on board any number of passengers greater than the number allowed by the certificate, the owner or master is liable to pecuniary penalties. Provisions are also made against various kinds of misconduct by the passengers (*o*); and the master of every ship carrying any passenger between any place in the united kingdom (or the channel islands), and any other place so situate, shall, when navigating within the limits

(*j*) 31 & 32 Vict. c. 119, s. 22.

(*k*) There are also provisions as to boats and barges on the River Thames; but these being of a local character are not noticed in the text. (See as to these, 2 & 3 Philip & Mary, c. 16; 22 & 23 Vict. c. xxxiii.)

(*l*) Of the previous Acts as to passengers in merchant vessels, the 4 Geo. 4, c. 88, and 14 & 15 Vict. c 79, were repealed by 17 & 18 Vict. c. 120, sched.; and the 15 & 16 Vict. c. 44, by 18 & 19 Vict. c. 119, s. 1. The 16 & 17 Vict. c. 84, as to passages between Ceylon and certain parts of the East Indies,—and 18 & 19 Vict. c. 104, called "The Chinese Passengers Act, 1855,"—are still in force.

(*m*) See 35 & 36 Vict. c. 73, s. 8.

(*n*) 17 & 18 Vict. c. 104, ss. 312, 318.

(*o*) Sects. 322—325; and see, also, 25 & 26 Vict. c. 63, ss. 35—37.

of any district for which pilots are licensed, (unless he or his mate has a certificate enabling him to conduct the vessel himself,) employ a qualified pilot; and, if he fails to do so, is liable to a penalty not exceeding 100*l.* (*p*).

As to passenger ships generally, there are the 18 & 19 Vict. c. 119, called "The Passengers Act, 1855," the 26 & 27 Vict. c. 51, called "The Passengers Amendment Act, 1863," and the 35 & 36 Vict. c. 73, ss. 5—8, the enactments whereof extend to every sea-going vessel, whether British or foreign, which carries more than *fifty* passengers (*q*), from the united kingdom, to any place out of Europe, and not being within the Mediterranean Sea (*r*); and, also, to every such colonial voyage as therein described (*s*). These Acts commit the execution of their provisions to "the Board of Trade" (*t*); or, in her Majesty's possessions abroad, to the officers there specially appointed for the purpose; or where there are none, or in their absence, to the chief customs officer of the place (*u*). They provide that no "passenger ship" shall (under penalty of forfeiture to the crown) clear out to sea, until duly surveyed and reported seaworthy: nor until the master shall have obtained, from the proper authority at the port of clearance, a certificate that the requirements of the Acts have been duly complied with; and that the ship is seaworthy, in safe trim, and in all respects fit for her voyage, and her passengers and crew in a fit state to proceed: nor until the master shall have joined in a bond to the crown in the sum of 2,000*l.*, conditioned, *inter alia*, for the seaworthiness of the vessel (*x*). The Acts also

(*p*) 17 & 18 Vict. c. 104, s. 354. See "The Hanna," Law Rep., 1 Adm. & Ecc. 283.

(*q*) See 26 & 27 Vict. c. 51, s. 3.

(*r*) See 18 & 19 Vict. c. 119, s. 4.

(*s*) Ibid.

(*t*) 35 & 36 Vict. c. 73. s. 5.

(*u*) 18 & 19 Vict. c. 119, ss. 8, 9.

(*x*) Sects. 11, 12, 19; 26 & 27 Vict. c. 51, ss. 13, 17. By this last section, if neither the owners nor charterers reside in the united kingdom, the bond is to be for 5,000*l.* See also the enactments which have been now made in regard to the seaworthiness of every British ship, *whether a passenger ship or otherwise*, mentioned sup. pp. 153, 154.

make a great variety of regulations, calculated to limit the number and to ensure the safety and accommodation of the passengers, but too numerous and too specific in their nature to be conveniently detailed on the present occasion (*y*); and the Acts extend moreover the general provisions which they contain, subject to such variations as the case may require, to *colonial* voyages—that is, voyages of more than four hundred miles, or three days, from any place within any of her Majesty's possessions abroad, except Hong Kong and the territories belonging, at the date of the Passengers Act, 1855, to the East India Company (*z*). They enact, also, that the master of every ship bringing passengers into the united kingdom, from any place out of Europe, and not within the Mediterranean Sea, shall twenty-four hours after arrival, deliver to the proper authority a correct list, under his signature, specifying the names, ages and callings of all the passengers embarked, and the ports from whence they came; and which of them (if any) have died, (with the supposed cause of death,) or have been born, during the voyage: and, if the master shall fail to deliver such list or it be wilfully false, he incurs a penalty not exceeding 50*l.* (*a*). Moreover, if any ship bringing passengers *into* the united kingdom from any place out of Europe, shall have on board a greater number of passengers or persons than in the proportions respectively comprised in the Acts for carrying passengers *from* the united kingdom, the master shall be liable to such pecuniary penalties as therein particularly set forth (*b*).

(*y*) 18 & 19 Vict. c. 119, ss. 13—94. By 33 & 34 Vict. c. 95, if authorized the carriage of *naval and military stores* in passenger ships.

(*z*) 18 & 19 Vict. c. 119, ss. 95, 99. With respect to any vessel plying between ports in *Australasia*, regulations as to the proper number of passengers may be made by the governor of the colony, from which such vessel shall proceed. (24 & 25 Vict. c. 52.)

(*a*) 18 & 19 Vict. c. 119, s. 100.

(*b*) Sect. 101.

Lastly, we may notice that by the 25 & 26 Vict. c. 63, s. 5, it is enacted, that every steam-ship which is required by the 17 & 18 Vict. c. 104, to have a master possessing a certificate from the Board of Trade (*c*), shall also have an engineer or engineers possessing a certificate from the same Board (*d*).

(*c*) Vide sup. p. 151.

(*d*) See 25 & 26 Vict. c. 63, ss. 5—12, 23, 24.

CHAPTER XI.

OF THE LAWS RELATING TO THE PRESS.

THE law of property in books and other publications has been already discussed under the head of copyright, in that part of our work in which the right to that species of property fell under consideration (*a*). Our attention will now therefore only be directed to the law which relates to the *means* of publication—in other words, to the press.

This mighty engine for good or for evil is one that in its nature requires to be kept under some restraint, while it is perhaps even yet more essential that the restraint should not be carried so far as to preclude a reasonable liberty of discussion. In this country no censorship is exercised over the press (*b*): yet its excesses are held in check by restrictive provisions, the general object of which is to ascertain in every instance by whom publications are printed; so as to make the publisher amenable, whenever the case so requires, to the civil remedy of injured parties, or to the correction of criminal justice (*c*).

(*a*) Vide sup. vol. II. p. 34.

(*b*) The censorship of the press, which under some form or other had existed with intermissions from the time of Hen. 8, came to an end in the reign of Will. 3, by the expiration of an Act then in force. See Lord Macaulay's History of England, vol. i. p. 167.

(*c*) See the Queen *v.* Hicklin, Law Rep., 3 Q. B. 360. It may be remarked here that the offence of libel may be prosecuted either by *indictment* or *criminal information*; but, as regards *defamatory* libels, an information will not be granted by the Queen's Bench unless the person applying for leave to file the same makes an affidavit pointedly asserting his innocence of the charge. (4 Bl. Com. 451, n. by Christian.)

The regulations now in force which concern this subject are to be found in the 32 & 33 Vict. c. 24 and the schedules thereto annexed (*d*). According to these, every person who shall print "any paper" for hire, reward, gain or profit shall (under a penalty of the sum of 20*l.* for every omission,) carefully preserve a copy of the same; and shall write or print thereon, in fair and legible characters, the name and place of abode of his employer; and shall produce such copy to any justice who, within the space of six calendar months, shall demand a sight thereof.

It is moreover provided that every person who shall print any paper or book whatsoever, for publication or dispersion, must print upon the front thereof (if the same be printed upon one side only), or upon the first or last leaf of every paper or book consisting of more than one leaf, in legible characters, his name and usual place of abode or business; and that every person who shall print, publish or disperse, or assist in publishing or dispersing, any paper or book printed without such particulars, shall, for every copy so printed, forfeit a sum not exceeding 5*l.*; and it is further enacted, that in the case of books or papers printed at the University Press of Oxford or the Pitt Press of Cambridge, the printer, instead of printing his name thereon, shall print the following words, "Printed at the University Press, Oxford," or "The Pitt Press, Cambridge," as the case may be (*e*). But no action or proceeding in any court or before any justice of the peace can be commenced under these provisions, except in the name of the attorney-general or solicitor-general.

It is, however, to be observed, that the above provision with respect to the printer's name and place of abode does not extend to any papers printed by the authority and

(*d*) The second schedule of this Act re-enacts certain of the enactments on this subject which are contained in 39 Geo. 3, c. 79; 51 Geo. 3, c. 65; 6 & 7 Will. 4, c. 76; 2 & 3 Vict. c. 12, and 9 & 10 Vict. c. 33. The first schedule repeals certain other provisions of those statutes.

(*e*) See Bensley *v.* Bignold, 5 B. & A. 335; Marchant *v.* Evans, 2 Moore, 14.

for the use of either House of Parliament (*f*). Nor does it extend to any bank note or security for payment of money, bill of lading, policy of insurance, letter of attorney, deed or agreement, transfer or assignment of public stock or securities, or dividend warrant thereon; or to any receipt for money or goods; or to any proceedings in any court of law or equity;—notwithstanding the whole or any part of the said securities, instruments and matters aforesaid shall be printed (*g*).

(*f*) 32 & 33 Vict. c. 24, sched. II., re-enacting 39 Geo. 3, c. 79, s. 28, and 51 Geo. 3, c. 65, s. 3.

(*g*) Ibid. By this Act of 32 & 33 Vict. c. 24, are repealed the regulations which existed at its date in reference to printing and publishing *newspapers* and *pamphlets*, and which were contained in 60 Geo. 3 & 1 Geo. 4, c. 9; 11 Geo. 4 & 1 Will. 4, c. 73, and 6 & 7 Will. 4, c. 76. As to the transmission of newspapers and other periodical productions through the post, see 18 Vict. c. 27, and sup. vol. II. p. 570. See also 34 & 35 Vict. c. 103, s. 29, providing that no proceedings shall be taken on bonds which had been executed under the provisions of 60 Geo. 3 & 1 Geo. 4, c. 9, prior to their repeal by 32 & 33 Vict. c. 24.

CHAPTER XII.

OF THE LAWS RELATING TO HOUSES OF PUBLIC RECEPTION AND ENTERTAINMENT.

THE regulations of a general kind which have been made by the legislature in reference to the subject-matter of the present chapter, relate to Public Houses and to Theatres (*a*).

1. As to Public Houses.

As to these, we may, in the first place, remark, that the enactments affecting public houses are of two kinds: the first having in view the subject of *revenue*, the other of *police*—that is, the proper regulation of these places of public reception, and the prevention of the abuses to which they are naturally liable.

The enactments first referred to relate to the Excise, a tax the general nature of which has been sufficiently noticed in a former volume (*b*); and by one of the excise

(*a*) There is, also, a statute which, as it is local only in its character, is not included among the enactments mentioned in the text. This Act (25 Geo. 2, c. 36, made perpetual by 28 Geo. 2, c. 19, s. 1,) requires every house, room, garden, or other place, kept in *London* or *Westminster*, or within a *circuit of twenty miles*, for public dancing, music, or other *public entertainment of the like kind*, "to be licensed by the quarter sessions, under penalty of being deemed and punishable as a disorderly house;" and over the doors of such places, there must be affixed and kept the words "Licensed pursuant to Act of Parliament of the twenty-fifth of King George the second;" and they are not allowed to be opened for the purpose of amusement before five o'clock in the afternoon. The cases on the construction of this Act are numerous. Hall *v.* Green (9 Exch. 247), Garrett *v.* Messenger (Law Rep., 2 C. P. 583), and Browne *v.* Nugent (ib., 6 Q. B. 693), are of recent date.

(*b*) Vide sup. vol. II. p. 565.

Acts it is, amongst other things, provided, that any person selling wine, spirits, beer, cider or perry, by retail, who shall carry on such his trade without taking out an *excise licence*, shall for every such offence forfeit 50*l.* (*c*).

Acts of the other description, viz., those which concern police, commence as early as the reign of Edward the sixth (*d*): but the chief of them, which are now in force, are the 9 Geo. IV. c. 61, "The Intoxicating Liquors (Licensing) Act, 1828;" the 32 & 33 Vict. c. 27, "The Wine and Beerhouse Act, 1869;" the 33 & 34 Vict. c. 29, "The Wine and Beerhouse Act Amendment Act, 1870," and the 35 & 36 Vict. c. 94, "The Licensing Act, 1872."

Under the first of the above group (9 Geo. IV. c. 61), every keeper of an inn, alehouse or victualling house, wherein is sold wine, spirits or other exciseable liquors by retail to be drunk or consumed on the premises, must, in addition to his excise licence (*e*), obtain a licence from the *justices* having jurisdiction in the place where the house is situate (*f*). And such licence is applied for at the "general annual licensing meeting" held in pursuance of that Act, but it may be refused if there be reasonable objection on the ground of character or otherwise (*g*). On the other hand, a licence to sell beer and cider, and perry, for consumption *off the premises* (*h*), might (under

(*c*) 6 Geo. 4, c. 81, s. 26. As to excise licences, see also 7 & 8 Geo. 4, c. 53; 4 & 5 Will. 4, c. 51; 4 & 5 Vict. c. 20; 18 & 19 Vict. c. 38; 23 Vict. c. 27; and 24 & 25 Vict. c. 91. It may be noticed that it forms one of the provisions of the Licensing Act, 1872; that nothing therein is to affect or apply to any penalties recoverable by or on behalf of the Commissioners of Inland Revenue or any laws relating to the excise (35 & 36 Vict. c. 94, s. 72.)

(*d*) See 5 & 6 Edw. 6, c. 25.

(*e*) See R. *v.* Drake, 6 Man. & Sel. 116; R. *v.* Downes, 3 T. R. 560; 1 Wms. Burn, 29.

(*f*) See Winn *v.* Mossman, Law Rep., 4 Exch. 292.

(*g*) If a licence be refused, an appeal lies to the quarter sessions for the county. See R. *v.* Middlesex Justices, 3 B. & Ad. 938; Reg. *v.* Deane, 3 Q. B. 96; Queen *v.* Belton, 11 Q. B. 379; Queen *v.* Cockburn, 4 Ell. & Bl. 265; The Queen *v.* Sylvester, 2 B. & Smith, 322; The Queen *v.* West Riding, Law Rep., 5 Q. B. 33; The Queen *v.* Pilgrim, ib., 6 Q. B. 89.

(*h*) See Cross, app. *v.* Watts, resp., 13 C. B. 239.

11 Geo. IV. & 1 Will. IV. c. 64; 4 & 5 Will. IV. c. 85; and 3 & 4 Vict. c. 61) have been obtained from the excise authorities without any licence from the justices (*k*). But by the 32 & 33 Vict. c. 27, 33 & 34 Vict. c. 29, and 35 & 36 Vict. c. 94, the necessity of a certificate from the justices is now made necessary before an excise licence can be granted for the sale of any intoxicating liquors, although not intended to be consumed on the premises (*l*).

Ever since the time when licences to sell exciseable liquors have been required to be obtained from the justices, they have been granted only subject to conditions having in view the preservation of sobriety and decorum in the premises wherein they are to be consumed. But it has now been thought fit by the legislature, for the better prevention of drunkenness, not only to enact (by 30 & 31 Vict. c. 142) that no action shall be maintainable in any court to recover any debt due for ale, porter, beer, cider or perry consumed on the premises where the same was sold or supplied; but also to subject public houses and all other places in which any species of intoxicating liquors are sold by retail, whether intended to be consumed on or off the premises, to a new and efficient system of inspection and restraint; and this policy is sought to be carried out by the Licensing Act, 1872 (35 & 36 Vict. c. 94), a statute of which we will proceed to give such a general account as is consistent with our limits.

And in the first place it is by that Act enacted, that if any person shall sell or expose for sale any intoxicating liquor without having a licence to sell, or at a place where, by his licence, he is not authorized to sell, he shall be liable, in the case of a first offence, to a penalty not exceeding 50*l.*, or imprisonment with or without hard labour for not

(*k*) The above group of statutes are commonly called "The Beer Acts." See, also, 24 & 25 Vict. c. 91, ss. 10, 13, 14.

(*l*) The statute called "The Intoxicating Liquors (Licences Suspension) Act, 1871" (34 & 35 Vict. c. 88), was repealed by 35 & 36 Vict. c. 94.

more than a month (*m*). And if any licensed person permits drunkenness, or any violent, quarrelsome or riotous conduct on his premises; or sells liquor to a drunken person, or spirits to be drunk on the premises to a child apparently under the age of sixteen; or permits his premises to be used as a brothel; or harbours on his premises any constable on duty, or shall bribe or attempt to bribe any constable; or shall suffer gaming or unlawful games to be carried on on his premises—he shall for such—and for some other cognate offences against public order specified in the Act—be liable to a pecuniary penalty, and also to have the conviction recorded on his licence; and such entry, in the case of two convictions, will cause a forfeiture of his licence, and disqualify him (and in some cases the *premises*) from afterwards obtaining a fresh licence (*n*).

But besides these enactments the Act contains stringent rules with regard to the *times* during which the sale of intoxicating liquors may be carried on; it being provided, that all premises wherein such liquors are sold by retail, if in London or any place subject to the jurisdiction of the Metropolitan Board of Works, or within the four-mile radius from Charing Cross, must be closed on week days between the hours of twelve at night and five on the following morning, and if situated elsewhere between the hours of eleven at night and six in the morning; but in premises situated beyond the metropolitan district, a discretion is given to the licensing justices to direct that the hour for closing at night be as early as ten or as late as twelve, and that the hour of opening in the morning be as early as five or as late as seven.

Moreover, special regulations on this subject are made with regard to Sunday, Christmas Day and Good Friday,

(*m*) 35 & 36 Vict. c. 94, s. 3. Second offence, 100*l*., or three months; third or any subsequent offence, 100*l*., or six months, and disqualification to hold licence. The *occupier* of unlicensed premises, on which intoxicating liquor is sold, is liable, if shown to have been privy or consenting to the sale. (Sect. 4.)

(*n*) See sects. 7, 13, 15, 16, 17.

it being enacted that on these days the hours of closing shall be, *in the metropolitan district*, between the hours of closing on the preceding night and one in the afternoon, and also between the hours of three and six of the afternoon; and in places *beyond* that district, between the hour of closing on the preceding night and half-past twelve in the afternoon, and also between the hours of half-past two and six of the afternoon. But in places situated beyond that district a discretion in general here, also, is given to the licensing justices to direct that the time for closing in the afternoon shall be between the whole of the day before one o'clock in the afternoon, and also between the hours of three and six of the afternoon (*n*). With respect, however, to the discretion of the justices as to the hours of closing, this general direction is given; that no premises in respect of which a certificate is in force under the Wine and Beerhouse Acts, 1869 and 1870, shall be allowed by

(*n*) The above appears to be the general result intended by the following portion of 35 & 36 Vict. c. 94, s. 24:—"Subject as hereinafter mentioned all premises on which intoxicating liquors are sold or exposed for sale by retail, shall be closed as follows: that is to say—(1.) If such premises are situated within the City of London or the liberties thereof, or of any parish or place subject to the jurisdiction of the Metropolitan Board of Works, or within the four-mile radius from Charing Cross, on Sunday, Christmas-day, and Good Friday, during the whole day before one of the clock in the afternoon, and between the hours of three and six of the clock in the afternoon; and after the hour of eleven of the clock at night; and on all other days before five of the clock on the following morning; (2.) If situated beyond the City of London and the liberties thereof, and the parishes or places subject to the jurisdiction of the Metropolitan Board of Works, or beyond the four-mile radius from Charing Cross, on Sunday, Christmas-day, and Good Friday, during the whole day before the hour of half-past twelve (or, if the licensing justices direct, one) in the afternoon, and between the hours of half-past two (or, if one be the hour of opening, then three) and six in the afternoon, and after the hour of ten (or, if the licensing justices direct, any hour not earlier than nine and not later than eleven) at night, and on all other days before the hour of six (or, if the licensing justices direct, any hour not earlier than five and not later than seven) in the morning, and after the hour of eleven (or, if the licensing justices direct, any hour not earlier than ten and not later than twelve) at night."

the justices to remain open after ten at night on Sunday, Christmas Day or Good Friday, or after eleven at night on other days; and that premises having such certificate, if beyond the metropolitan district and in a town having less than 2,500 inhabitants, may not on *any* day be open after ten at night (*o*).

It is further to be noticed that any person who sells or exposes for sale, or keeps open any premises for the sale of intoxicating liquors, during the times that such premises should be closed, or who allows during such times intoxicating liquors to be consumed thereon, shall be liable to a penalty of 10*l.* for the first and 20*l.* for any subsequent offence; but nothing in the Act shall preclude a licensed person from selling intoxicating liquor for consumption on the premises at any hour to *bonâ fide* travellers, or to persons lodging in his house, or in the case of a railway station to persons arriving at or departing from such station by railroad (*p*).

Fresh provisions are also made in the Act with regard to the manner in which licences are to be granted, and for this purpose the justices in quarter sessions for every county are directed annually to appoint among themselves a *licensing committee*, consisting of not less than three nor more than twelve members (*q*); by whom the grant of all new licences, made at the general annual licensing meeting, must be confirmed (*r*). And analogous provisions are made

(*o*) 35 & 36 Vict. c. 94, s. 24.

(*p*) Ibid. As to who are bonâ fide travellers, see Taylor, app. *v.* Humphreys, resp., 10 C. B. (N. S.) 429; Tennent *v.* Cumberland, 1 E. & E. 401; Peache *v.* Colman, Law Rep., 1 C. P. 324; Peplow *v.* Richardson, ib., 4 C. P. 168; Davis *v.* Scrace, ib., p. 172; Morgan *v.* Hedger, ib., 5 C. P. 485.

(*q*) The local authority of any licensing district may, on proper cause shown, exempt any licensed person in the immediate neighbourhood of a market, theatre, or place where some lawful trade or calling is carried on, from the closing provisions of the Act, save only between the hours of one and two o'clock in the morning. (Sect. 26.) A licensed person may also obtain, from the local authority, an exemption in respect of *special occasions* to be specified in his licence. (Sect. 29.)

(*r*) Sect. 37.

with regard to borough justices; except that where there are less than ten acting justices in the borough the licensing committee is to be a "joint committee:" that is to say, is to consist of three of the borough magistrates and of three of the magistrates of the county in which such borough is situated (*s*).

In addition to the public houses already mentioned, a distinct class of houses for the refreshment of the public were sanctioned by the legislature in the year 1860, and placed under systematic regulation. We refer to "refreshment houses," which were established by 23 Vict. c. 27 (amended by 24 & 25 Vict. c. 91, ss. 8—11), and in order to keep such refreshment house it is made necessary to obtain from the officers of Inland Revenue an excise licence bearing an excise duty (*t*), —a licence which can now (by force of the 32 & 33 Vict. c. 27) only be granted on a certificate from the justices, as in other cases of licensed houses; and according to the requirements of the Licensing Act, 1872, no intoxicating liquor shall be consumed upon premises licensed as a refreshment house, but not for the sale of any intoxicating liquor, during the hours during which licensed victuallers must keep their houses closed (*u*). It is also provided by 23 Vict. c. 27, that any person who shall be licensed to keep a refreshment house, and shall pursue therein the business of a confectioner,—or who shall keep open such house for the purpose of selling, to be consumed therein, animal or other victuals, wherewith wine or other fermented liquors are usually drunk,—shall be entitled (subject to the terms of the Act) to take out an excise licence to sell wine by retail in such house, to be consumed on the premises (*v*). It is further provided (without reference to refreshment houses), that any person keeping a shop for the sale of goods and commodities shall be entitled to

(*s*) 35 & 36 Vict. c. 94, s. 38.
(*t*) 23 Vict. c. 27, ss. 1, 2, Sched. No. 1.
(*u*) 35 & 36 Vict. c. 94, s. 27.
(*v*) Ibid.

take out another sort of excise licence, to sell therein wine by retail, in reputed quart or pint bottles only, and not to be consumed in the shop (*w*). But excise licences to sell wine by retail can now only be granted on a certificate from the justices (*x*). And, lastly, we may mention, among other matters which our limits prevent us from particularizing, that refreshment houses *not* licensed for the sale of intoxicating liquors, are placed under the same limits as to the hours during which they may be kept open, as have been already specified with regard to licensed victualling and other public houses (*y*).

2. As to Theatres.

The statute 6 & 7 Vict. c. 68, intituled "An Act for regulating Theatres," first repeals the then existing enactments as to theatres (*z*), and then proceeds to prohibit, under penalties, all persons from having or keeping (*a*) any house or other place of public resort in Great Britain, for the public performance of stage plays (*b*), unless they shall have the authority of letters-patent from the crown, or a licence from the lord chamberlain of the household, or licence from at least four justices assembled at a special session, to be holden in the division where the proposed theatre is to be situate (*c*).

(*w*) See 23 Vict. c. 27, s. 1, Sched. No. 3.

(*x*) See 32 & 33 Vict. c. 27, s. 4.

(*y*) 35 & 36 Vict. c. 94, s. 27. Vide sup. p. 197.

(*z*) There were enactments on this subject in 39 Eliz. c. 4; 3 Jac. 1, c. 21; 12 Ann. st. 2, c. 23; 10 Geo. 2, c. 28; 28 Geo. 3, c. 30.

(*a*) See The Queen *v.* Strugnell, Law Rep., 1 Q. B. 93.

(*b*) A "stage play" is defined by the Act to include any tragedy, comedy, farce, opera, burletta, interlude, melo-drama, pantomime, or other entertainment of the stage or any part thereof; but not a theatrical representation in a booth or show duly allowed by the justice of the peace, or other person having authority in that behalf, at a fair or feast, &c. (6 & 7 Vict. c. 68, s. 23.) As to what is an "entertainment of the stage" within the meaning of this section, see Wigan *v.* Strange, Law Rep., 1 C. P. 175.

(*c*) Sect. 2. By 2 & 3 Vict. c. 47, s. 46, the commissioners of police may authorize a superintendent with constables to enter any place used within the metropolitan police district for dramatic entertainment,

The jurisdiction of the lord chamberlain as to licensing, is defined by the Act as extending to all theatres, (not being patent theatres,) within the parliamentary boundaries of London and Westminster; and within the boroughs of Finsbury and Marylebone, the Tower Hamlets, Lambeth, and Southwark; and also within those places where the sovereign shall occasionally reside. The jurisdiction of the justices on the other hand extends, generally, to all places beyond these limits (*b*). But it is provided, that no licence shall be granted by either of these authorities, except to the actual and responsible manager of the proposed theatre for the time being; who is to give security for the due observance of such regulations as the authorities may impose: and also that no licence from the justices shall be in force at the universities of Oxford or Cambridge, or within fourteen miles of the same, without consent of the chancellor or vice-chancellor (*c*). Penalties are moreover imposed on any person who, for hire, shall act, or cause to be acted, any part of a stage play, in a place not being a patent theatre or duly licensed (*d*).

The statute further empowers the justices to make suitable rules for ensuring order and decency in the theatres to be licensed by them, and for regulating the times when they are to be open; which rules may be rescinded or altered by a secretary of state; and in case of a riot or breach of rule in any such theatre, the justices may order the same to be closed.

The lord chamberlain may also,—as to all theatres licensed by him, and also as to patent theatres,—order the same to be closed, in case of riot or on any public occasion whatever (*e*). It is also provided, that one copy

and which is not a licensed theatre, and take into custody all persons found therein. (See Fredericks *v.* Howie, 1 H. & C. 881; *v.* Payne, ib. 584.)

(*b*) 6 & 7 Vict. c. 68, s. 3.
(*c*) Sect. 10.
(*d*) Sect. 11.
(*e*) Sect. 8.

of every new stage play,—and, indeed, of every new act, scene, part, prologue or epilogue of a play, intended to be acted for hire at any theatre in Great Britain,—shall be sent seven days previously to the lord chamberlain, for his allowance; and without such allowance it shall not be lawful to act the same (*f*). The lord chamberlain is moreover empowered to forbid, under penalties in case of disobedience, the representation or performance of any stage play, or part thereof, in any theatre whatever, whenever such a course shall appear to him advisable, whether for the preservation of good manners or decorum, or with a view to preserve the public peace (*g*).

(*f*) 6 & 7 Vict. c. 68, s. 12. (*g*) Sect. 14.

CHAPTER XIII.

OF THE LAWS RELATING TO PROFESSIONS.

In most employments the rewards resulting from success, and the discredit and failure consequent upon incompetency, form a natural and sufficient security to the public, that they will not be undertaken without the necessary qualifications; but there are professions productive of evils so serious, when improperly exercised, and so liable at the same time to be exercised by unfit persons, as to make it proper to subject them to the restraints of legal regulation. Those which our law deems to be of that character, (or those at least which have especially attracted the notice of our legislature as such,) are the professions of medicine and of law.

And, first, as to the medical profession.

The necessity of placing under supervision the practitioners of physic and surgery was early acknowledged; for we find so long ago as the third year of Henry the eighth, a statute (c. 11) by which it is enacted, that no person within London, or seven miles thereof, shall practise as a physician or surgeon without examination and licence (*a*).

(*a*) By 3 Hen. 8, c. 3, the bishop of the diocese was associated with the faculty for the purpose of such examination and licence. By the same Act the privileges of the Universities of Oxford and Cambridge, with regard to degrees in medicine and surgery, are expressly preserved. By 17 & 18 Vict. c. 114, and 21 & 22 Vict. c. 90, s. 53, the right of practising physic (not including, however, in that term the practice of surgery, pharmacy, or midwifery) is extended to graduates of the University of *London*.

By royal charter of date 23rd September, 10 Hen. VIII., confirmed by the statute 14 & 15 Hen. VIII. c. 5, and the 32 Hen. VIII. c. 40, a college of physicians in London was established (*b*); and it was ordained, that this college should choose four physicians yearly, to supervise all others within London and seven miles thereof, "as also their medicines and receipts," so that such as offended should be punished with fines, imprisonment, or other means; and that no person should be at liberty to practise physic or surgery within that circle, except by the licence of the college; and this charter of Hen. VIII. was subsequently confirmed and enlarged by the Act of 1 Mar. sess. 2, c. 9, and by certain other charters of later dates, viz., the 8th of October, in the fifteenth year of James the first, and the 26th of March, in the fifteenth year of Charles the second (*c*).

With regard to *surgeons*, the first of the statutes we have cited (viz. 3 Hen. VIII. c. 11) expressly includes this class of practitioners within its provisions. In the same reign, the united "company of barbers and surgeons of London" were again regulated by the statute 32 Hen. VIII. c. 42, and the 34 & 35 Hen. VIII. c. 8 (*d*); and afterwards by a charter in their favour, bearing date the 15th of August, 5 Car. I., all persons, (except such physicians as therein mentioned,) were pro-

(*b*) By 14 & 15 Hen. 8, c. 5, the president was to be elected out of certain physicians of the college, termed *elects;* but the provisions with regard to these officers were repealed by 23 & 24 Vict. c. 66, s. 5—an Act to be presently referred to in the text.

(*c*) The following are some of the cases in which questions respecting the privileges of the college of physicians, under these Acts and charters, have arisen:—R. *v.* Askew, 4 Burr. 2186; Rose *v.* Physicians' College (in error), 5 Bro. P. C. 553; R. *v.* Physicians' College, 7 T. R. 282; Moises *v.* Thornton, 8 T. R. 303; Collins *v.* Carnegie, 1 Ad. & El. 695.

(*d*) At the date of these statutes there appear to have been two distinct companies of surgeons,—one called the *Barbers of London*, the other the *Surgeons of London*—the two callings being at that period often pursued by the same class of persons.

hibited from exercising surgery within London and Westminster, or within seven miles from London, for profit, unless first duly examined and admitted by the company. And by statute 18 Geo. II. c. 15, and charter of the 22nd of March, 40 Geo. III. and again by charter of the 14th of September, in the seventh year of Victoria, "The Royal College of Surgeons of England" was established in its present constitution. By this last charter there was created a new class of members, called *fellows*, from whom and by whom the council of the college were to be in future elected; and it provides that all future examiners shall be elected by, and hold their office at the pleasure of, the council. The charter also contains a clause, that no bye-law or ordinance thereafter to be made by the council shall be of any force, until the royal approbation thereof shall have been signified to the college, under the hand of a principal secretary of state; or shall have been otherwise approved in such manner as parliament shall direct.

With respect to *apothecaries*, this class of practitioners first obtained a charter from James the first, which was afterwards confirmed and enlarged by the statute 55 Geo. III. c. 194. These provide, that no person shall practise as an apothecary, or act as an assistant to an apothecary, in any part of England or Wales, unless he shall have been examined and shall have received a certificate of his being duly qualified from the "Society of the Art and Mystery of Apothecaries of the City of London"(*e*).

This certificate is not to be granted to any person below the age of twenty-one, nor to any but such as have

(*e*) 55 Geo. 3, c. 194, s. 14. As to what constitutes practice as an apothecary, see The Apothecaries' Company *v.* Warburton, 3 B. & Ald. 40. As to the certificate, see Young *v.* Geiger, 6 C. B. 541. By 6 Geo. 4, c. 133, s. 4, every person holding a warrant as surgeon or assistant surgeon in the army or navy may practise as an apothecary, without undergoing the examination or obtaining the certificate required by 55 Geo. 3, c. 194.

served an apprenticeship of five years to some apothecary, and can produce testimonials of sufficient medical education and good moral conduct; and any person practising without a certificate is not only disabled by this Act from recovering his charges (*f*), but is moreover made liable to a penalty of 20*l.* for every such offence (*g*).

It is also provided, that any apothecary refusing to compound or sell, or negligently compounding or selling, any medicines as directed by any prescription or order signed with the initials of any physician lawfully licensed shall incur certain penalties (*h*). And, further, that the society of apothecaries—or any two or more qualified persons by them appointed—may at all reasonable times in the daytime enter any apothecary's shop and examine whether the medicines and drugs there kept be wholesome, and may destroy such as they find otherwise, and report the names of the offenders: who are made thereupon liable to a fine of 5*l.* for the first, 10*l.* for the second, and 20*l.* for the third offence (*i*).

The Act contains, however, a proviso that nothing therein shall affect the business of a *chemist and druggist* (*k*), with reference to the buying, preparing, compounding, dispensing (*l*), and vending, of drugs, me-

(*f*) 55 Geo. 3, c. 194, s. 21. See Young *v.* Geiger, 6 C. B. 541.

(*g*) See Brown *v.* Robinson, 1 Car. & P. 264; The Apothecaries' Company *v.* Greenwood, 2 B. & Adol. 709. It may be remarked that this Act is not either expressly or by implication repealed by 21 & 22 Vict. c. 90 (The Medical Act, 1858); and that a certificate under it is consequently still required in order to support an action by a surgeon, for the supply of medicines in a case not requiring surgical attendance. (See Simon *v.* Fletcher, Weekly Notes, 17 May, 1873, p. 101.)

(*h*) Sect. 5.

(*i*) Sect. 3.

(*k*) Sect. 28. But by 15 & 16 Vict. c. 56 (amended by 31 & 32 Vict. c. 121), every person retailing or compounding such *poisons* as the Acts specify, or assuming the title of chemist or druggist, must be duly examined, registered and certified by the "Pharmaceutical Society of Great Britain."

(*l*) As to the meaning of *dispensation* in pharmacy, see Apothecaries' Company *v.* Burt, 5 Exch. 363.

dicines, and medicinable compounds, wholesale and retail (*m*); nor shall interfere with the rights of the universities of Oxford or Cambridge, the College of Physicians or of Surgeons, or the Society of Apothecaries respectively, except as altered by that Act.

Such were the different charters and statutes by which the medical profession in England (including in that term physicians, surgeons and apothecaries) was chiefly governed till within a recent period. But in the year 1858, the legislature interfered with the object of enabling persons requiring medical aid to distinguish qualified from unqualified practitioners; and an act of parliament then passed, which introduced important and salutary regulations in this behalf. And of the 21 & 22 Vict. c. 90 ("The Medical Act, 1858"),—as amended by 22 Vict. c. 21, 23 Vict. c. 7, 23 & 24 Vict. c. 66, 25 & 26 Vict. c. 91, 31 Vict. c. 29, and 32 & 33 Vict. c. 117 ("The Pharmacy Act, 1868"),—some account shall be here given (*n*).

By these Acts a "general council" of medical educa-

(*m*) It may be here noticed, that by 14 & 15 Vict. c. 13 (which is not affected by the 15 & 16 Vict. c. 56, and 31 & 32 Vict. c. 121, above mentioned), the sale of *arsenic* and arsenious preparations is subjected to certain special rules. Particulars of the sale are to be signed by the purchaser, comprising his name and address, the quantity sold, and the purpose for which it is required; and where he is unknown to the vendor, the sale must be in the presence of a common acquaintance. The purchaser must, moreover, be a person of full age; and the arsenic must be coloured with an *admixture of indigo or soot*, unless where represented by the purchaser to be required for some purpose for which it would be rendered unfit by such admixture; in which case it may be sold uncoloured in a quantity of not less than ten pounds. But the Act does not extend to arsenic forming part of the prescription of a qualified member of the medical profession, nor to such as is sold wholesale to a retail dealer, upon an order in writing in the ordinary course of business. (As to sale of poisons *generally*, see Berry, app. Henderson, resp., Law Rep., 5 Q. B. 296.)

(*n*) It may be remarked that by 36 & 37 Vict. c. 55, the Medical Acts are amended in certain matters, so far as regards the *University of London*.

tion and registration of the united kingdom is established as a body corporate, with a perpetual succession and a common seal, and with capacity to hold lands for the purposes of the Acts (*o*). Such council consists of members chosen from time to time by certain colleges and bodies—including the Royal Colleges of Physicians and Surgeons, and Society of Apothecaries already mentioned,—together with six persons nominated by the crown (*p*), and a president who is elected by the council itself (*q*). Each of the electing bodies returns one representative (*r*).

To this general council is entrusted the duty of carrying out, through the agency of their secretary, a system of registration of all medical practitioners, calculated to ensure their addresses and qualifications being generally known,—the registers being (with this object) printed, published and sold to the public under the style of "The Medical Register" (*s*).

Upon these registers are entitled to be placed (on payment of a fixed fee) any person who, on the 1st October, 1858, was possessed of any one or more of the following qualifications (*t*); viz. 1, as fellow, member (*u*), licentiate, or extra-licentiate of the Royal College of

(*o*) 25 & 26 Vict. c. 91, s. 1. The copyright of the British Pharmacopœia, published by the general council, is vested in that body by the same Act, but the price of the work to the public is to be fixed by the Commissioners of the Treasury. (Ibid.)

(*p*) Of these, four are to be appointed for England, one for Scotland, and one for Ireland. (21 & 22 Vict. c. 90, s. 4.)

(*q*) Ibid.

(*r*) The electors (in addition to the colleges and society mentioned in the text) are the universities of Oxford, Cambridge, Durham, London (see The Queen *v.* Storrar, 2 Ell. & Ell. 133), and Dublin; the universities of Edinburgh and Aberdeen (collectively); the universities of Glasgow and St. Andrews (collectively); the Queen's University in Ireland; the Colleges of Physicians and of Surgeons of Edinburgh; the Faculty of Physicians and Surgeons of Glasgow; the King and Queen's College of Physicians in Ireland; the Royal College of Surgeons in Ireland; and the Apothecaries' Hall in Ireland (21 & 22 Vict. c. 90, s. 4).

(*s*) Sect. 27.

(*t*) Sects. 15, 27.

(*u*) See 22 Vict. c. 21, s. 4.

Physicians in London; 2, as fellow, member (*v*), or licentiate of the Royal College of Physicians of Edinburgh; 3, as fellow or licentiate of the King and Queen's College of Physicians of Ireland; 4, as fellow, member, or licentiate in midwifery of the Royal College of Surgeons of England; 5, as fellow or licentiate of the Royal College of Surgeons of Edinburgh; 6, as fellow or licentiate of the Faculty of Physicians and Surgeons of Glasgow; 7, as fellow or licentiate of the Royal College of Surgeons in Ireland; 8, as licentiate of the Society of Apothecaries of London; 9, as licentiate of the Apothecaries' Hall, Dublin; 10, as doctor or bachelor or licentiate of medicine, or master in surgery, of any University of the United Kingdom; 11, as having the diploma or licence in surgery of any University in Ireland duly authorized to grant the same (*w*); 12, as doctor of medicine by doctorate granted prior to the passing of the Act by the Archbishop of Canterbury; 13, as doctor of medicine of any Foreign or Colonial University or College, and practising as a physician in the United Kingdom before 1st October, 1858: but in the case of this last qualification, there must be produced a certificate that the degree was taken after regular examination; or, at the least, some grounds must be established sufficient to satisfy the council that there is sufficient reason for admitting him to be registered (*x*).

Any person is also entitled to be registered who, after the 1st October, 1858, shall become (subject to the pro-

(*v*) See 22 Vict. c. 21, s. 4.

(*w*) See 23 Vict. c. 7, s. 1.

(*x*) By 21 & 22 Vict. c. 90, s. 46 (as to which see 22 Vict. c. 21, s. 5), the general council is enabled to dispense with such regulations as they shall think fit, in favour of practitioners at the date of the Act in any part of her Majesty's dominions other than Great Britain and Ireland, or having colonial diplomas or degrees; and also in favour of such persons as shall have been naval or military surgeons, or surgeons in the public service, or in the service of any charitable institution; and also in favour of medical students who commenced their studies before the Act passed.

visions of the Acts) possessed of any one or more of the first eleven of the above qualifications (*y*). Moreover, any person is entitled to be registered who, prior to the 1st August, 1815, was actually practising medicine in England, on his producing a declaration signed by himself to that effect (*z*).

Such being the persons entitled to be registered, the Acts proceed to provide that, after 1st January, 1859, none other than registered persons shall be entitled to claim the title of legally or duly qualified medical practitioners (*a*); nor to recover any charge in any court of law for any medical or surgical advice or attendance (*b*), or for the performance of any operation, or for any medicine which they have both prescribed and supplied (*c*); nor to hold any of the government or other medical appointments specified in the Act (*d*); nor to sign any certificate required by act of parliament to be signed by a medical practitioner (*e*). The Acts provide, on the other hand, that every person duly registered shall be not only entitled, according to his qualification, to practise medicine or surgery, or both (as the case may be), in any of her Majesty's dominions (*f*)—but also to recover in any court of law, with full costs of suit, reasonable charges for professional aid, advice and visits, and the costs of any medicines or other medical or surgical appliances by him supplied to his patients (*g*). It is necessary, how-

(*y*) See 21 & 22 Vict. c. 90, ss. 15, 27.

(*z*) Sect. 17. See the form, sched. (B.) As to making false declaration, see sect. 39.

(*a*) Sect. 34. As to the penalties attaching to a false assumption of title, see sect. 40, and Ellis *v.* Kelly, 6 H. & N. 222.

(*b*) See De la Rosa *v.* Prieto, 16 C. B. (N. S.) 578.

(*c*) Sect. 32. See Wright *v.* Greenroyd, 1 B. & S. 758.

(*d*) Sect. 36.

(*e*) Sect. 37.

(*f*) Sect. 21. See Turner *v.* Reynall, 14 C. B. (N. S.) 328. But with regard to practising in the *colonies*, see 31 Vict. c. 29.

(*g*) Vide sup. p. 207, n. (*g*). It may be observed, here, that the name of any person proved guilty of infamous conduct in any professional respect, may be ordered by

ever, to mention that this last enactment is subject to a qualifying proviso with regard to *physicians*, whose employment (like that of barristers) had always previously been held to be of a merely honorary description and insufficient—unless in virtue of an actual contract (*h*)—to support an action for their fees (*i*). Accordingly—and in support of this assumption—the Acts provide that any College of Physicians may pass a bye-law to the effect that none of their fellows or members shall be entitled to sue for their fees, and that such bye-law may be pleaded in bar to any action commenced for the recovery thereof. This proviso, however, does not extend to *surgeons*; for these have always been held entitled to recover a reasonable compensation for their services, even in the absence of a special contract (*k*).

In addition to the power of recovering their charges thus expressly conferred on registered practitioners, they are also exempted, if they so desire, from serving on juries or inquests, or in the militia, or any municipal or parochial office (*l*).

Besides its functions as above described in reference to the formation of registers, authority is given to the general council to make representation to the Privy Council, if it shall find that any of the bodies which are entitled by the Acts to grant qualifications, attempt to impose upon any candidate for examination any obligation to adopt, or refrain from adopting, the practice of any particular theory of medicine or surgery (*m*). It is also empowered to re-

the council to be erased from the register. See Ex parte La Mert, 4 B. & Smith, 582.

(*h*) See Veitch *v.* Russell, 3 Q. B. 928.

(*i*) Co. Litt. 265 n. See Chorley *v.* Bolcot, 4 T. R. 317; Little *v.* Oldaker, 1 Car. & M. 370; Buttersby *v.* Lawrance, ibid. 277.

(*k*) See Lipscombe *v.* Holmes, 2 Camp. 441; Baxter *v.* Gray, 4 Scott, N. R. 374; Simpson *v.* Rolfe, 4 Tyr. 325; Richmond *v.* Coles, 1 Dowl. (N. S.) 560.

(*l*) 21 & 22 Vict. c. 90, s. 35. As to their exemption from serving on a *jury*, see the Juries Act, 1870 (33 & 34 Vict. c. 77).

(*m*) 21 & 22 Vict. c. 90, s. 23.

quire information from any such bodies as to the course of study and examination which they require from candidates; and in like manner to represent the case to the Privy Council, if such course seems not such as to secure the possession of the requisite knowledge and skill. And the Privy Council may either for a time or altogether deprive such body so reported, of the power of granting qualifications (*n*).

The Acts further provide (*o*), that it should be lawful for her Majesty to grant to the corporation of the Royal College of Physicians of London (*p*) a new charter under the name of the "Royal College of Physicians of England:" the acceptance of which should operate as a surrender of all previous charters, except that granted by Henry VIII.; and also of all the privileges conferred by or enjoyed under the 14 & 15 Hen. VIII. c. 5, which should be inconsistent with such new charter (*q*).

Finally, there is a provision, that nothing in the Acts contained shall affect the business of a *chemist* and *druggist* (*r*).

We have also to notice, in connexion with the medical profession, the 2 & 3 Will. IV. c. 75 (amended by 34 Vict. c. 16), intituled "An Act for regulating Schools of Anatomy;" by which it is provided, that the executor

(*n*) Sects. 18—21.

(*o*) The Acts also empower the Royal College of Surgeons of England to examine and grant certificates of fitness as *dentists*, to persons desirous of being so examined. (21 & 22 Vict. c. 90, s. 48.) They also provide for the publication, by the general council, of a new "British Pharmacopœia." (Sect. 54; and see 25 & 26 Vict. c. 91, ss. 2, 3.)

(*p*) See 23 & 24 Vict. c. 66.

(*q*) Provisions are also contained in 21 & 22 Vict. c. 90, with regard to granting fresh charters to the Royal College of Physicians of Edinburgh, under the name of the "Royal College of Physicians of Scotland," and, also, as to granting charters to "The Royal College of Physicians of Ireland," and to a "Royal College of Surgeons of Scotland." (Sects. 49—52.)

(*r*) As to these, vide sup. p. 207.

or other person having lawful possession of the body of a deceased person,—and not being intrusted with it for interment only,—may permit the body of such person to undergo anatomical examination, unless in his lifetime he shall have expressed, in such manner as in the Act specified, a wish to the contrary: or unless the surviving husband or wife, or other known relation of such person, shall otherwise require (*s*). And further, that the secretary of state for the home department may grant licences to practise anatomy, to any members of the royal college of physicians or surgeons, or to any graduates or licentiates in medicine, or any professor or teacher of anatomy, medicine or surgery, or any student attending any school of anatomy,—on application by such parties for the purpose, countersigned by two justices of the peace in such manner as the Act provides: and that it shall be lawful for persons so licensed to receive or possess for anatomical examination, or to examine anatomically, the body of any person deceased, if permitted so to do by a person having lawful authority as aforesaid in that behalf. But no anatomical examination shall be lawful, unless conducted at some place of which such secretary of state shall have had a week's notice as a place where it is intended to practise anatomy: and the secretary of state is to appoint inspectors for all such places, who are to make quarterly returns as to the dead bodies carried in for examination. By this Act also, together with some preceding statutes relating to the criminal law, all former provisions of the legislature authorizing the dissection of the bodies of criminals after their *execution* are repealed.

II. As to the legal profession.

We shall here speak only of *attornies and solicitors*—inasmuch as barristers (as observed in a former volume) are, in general, left to the supervision of the Inns of Court,

(*s*) See The Queen *v.* Feist, 27 L. J., M. C. 164.

by which they are called to the bar; and are not made the subject of the regulations of any Act of Parliament (*t*).

The statutes relating to attornies and solicitors, formerly very numerous and complicated, are now chiefly contained in the 6 & 7 Vict. c. 73,—as amended by 23 & 24 Vict. c. 127; 33 & 34 Vict. c. 28; 34 Vict. c. 18; and 35 & 36 Vict. c. 81 (*u*).

By the first of these statutes it is enacted, that no person shall act as an attorney or solicitor, or as such sue out any writ or process, or commence, carry on, solicit or defend any action or other proceeding in the name of any other person or in his own name, in any court of civil or criminal jurisdiction, or in any court of law or equity in England or Wales,—unless he shall have been admitted, enrolled, and be otherwise duly qualified, to act as attorney or solicitor, either previously to, or else in pursuance of, that Act (*v*).

To entitle a person to such admission and enrolment, it

(*t*) Vide sup. vol. I. p. 19. As to attornies and solicitors, see also post, bk. V. c. III. As to *notaries publio*, see 41 Geo. 3, c. 79; 6 & 7 Vict. c. 90; Queen *v.* Scriveners' Company, 3 Q. B. 939. See also 33 & 34 Vict. c. 97, in sched.

(*u*) See also 7 & 8 Vict. c. 86, and 14 & 15 Vict. c. 88; and as to the admission to practise in England of *colonial* attornies, see 20 & 21 Vict. c. 39. It may here be noticed that it forms one of the provisions of the Judicature Act, 1873, that after the commencement thereof (that is to say, from and after the 2nd November, 1874), all persons then empowered to practise as solicitors, attornies or proctors in any court, the jurisdiction whereof is by that Act transferred to the High Court of Justice or the Court of Appeal, or thereafter admitted to practise therein, shall be called "solicitors of the Supreme Court." (36 & 37 Vict. c. 66, s. 37.)

(*v*) 6 & 7 Vict. c. 73, s. 2. A person who acts as an attorney or solicitor, contrary to this enactment, is declared by 23 & 24 Vict. c. 127, s. 26, to be guilty of contempt of court, to be incapable of recovering his fees, and to be liable to a penalty of 50*l.* (And see Ex parte Buchanan, 8 Q. B. 833.) But by 7 & 8 Vict. c. 101, s. 68, clerks and officers to boards of guardians, &c., under the Poor Laws, may commence or defend proceedings before magistrates in special or petty sessions, or out of sessions, without being qualified as attornies. (And see 23 & 24 Vict. c. 127, s. 33.)

is required, 1st, that he shall have *served as clerk* for five years, (having first been duly bound by contract in writing,) with some practising attorney or solicitor in England or Wales. But a service of *three* years will suffice if he shall have taken a degree, (after examination and under such circumstances as in the Act mentioned,) at Oxford, Cambridge, Dublin, Durham, or London, or at the Queen's University in Ireland, or in any of the Universities in Scotland (*x*); or if he shall have been a barrister (*y*) or have been for the term of ten years a clerk to some practising attorney, solicitor or proctor (*z*); or if he shall have been admitted and enrolled as a writer to the Signet, or as a solicitor in the Supreme Courts of Scotland, or as a procurator before any of the sheriff's courts(*a*). And, 2ndly, it is required that, in addition and subsequently to such service, he shall have been *examined* touching his articles and service, and also as to his general fitness and capacity to practise (*b*).

Upon the competency of the candidate for admission being certified by the examiners appointed for this purpose, an oath is administered to him to the effect, "that "he will truly and honestly demean himself in practice," and also the oath of allegiance: and after such oaths he

(*x*) See 23 & 24 Vict. c. 127, s. 2, repealing 6 & 7 Vict. c. 73, s. 7. *Four* years' service is sufficient if the clerk (though he shall not have proceeded to a degree) shall have successfully passed a prescribed examination in any of the above universities. (See 23 & 24 Vict. c. 127, s. 5; Ex parte Bradford, 1 E. & E. 417.)

(*y*) Sect. 3.

(*z*) Sect. 4. See In re Sherry, Law Rep., 3 Q. B. 164.

(*a*) Sect. 15.

(*b*) 6 & 7 Vict. c. 73, ss. 16, 17, 18; 23 & 24 Vict. c. 127, ss. 8, 9. By these provisions, in addition to the examination as above, all persons becoming bound under articles of service—with the exception of such as have been called to the bar, or have taken a degree in one of the above universities, or passed certain university examinations, (including the local and non-gremial examinations at Oxford and Cambridge,)—are to be preliminarily examined in such branches of *general knowledge* as shall be thought proper. There is also an *intermediate* examination of all clerks under articles, which is held, pending their service, in order to ascertain the progress they have made in their studies.

is forthwith "admitted," and his name duly enrolled; and such admission is written on parchment, and impressed with the proper stamp (*c*).

It is moreover enacted, that there shall be a *Registrar* of attornies and solicitors, whose duty it shall be to keep an alphabetical list or roll of all attornies and solicitors, and to issue certificates to persons who have been duly admitted and enrolled; and the duties of this office are committed to the "Incorporated Law Society," until some person shall be appointed in their room (*d*).

Such a certificate from the Registrar, of due admission and enrolment, must be produced to the proper authorities, by any person desirous of practising as an attorney or solicitor, in order that it may be duly impressed with the proper stamp duty, authorizing him to practise for the ensuing year (*e*). And in order to obtain such Registrar's certificate, a declaration in writing, (signed by the attorney desirous of practising, or by his partner, or in some cases by his London agent,) containing his name and address, the courts of which he is an admitted attorney or solicitor, and the date of his admission, must be delivered to the Registrar (*f*). And if any attorney or solicitor shall practise in any court, without having obtained a stamped certificate for the current year, he shall be incapable of maintaining any action or suit to recover his fees or disbursements for business done under such circumstances (*g*).

(*c*) 6 & 7 Vict. c. 73, ss. 15, 16.

(*d*) Sect. 21.

(*e*) Sect. 22; 23 & 24 Vict. c. 127, s. 18. The value of the stamp on the yearly certificate is at present regulated by the 33 & 34 Vict. c. 97 (The Stamp Act, 1870) as follows:—If the attorney or solicitor resides within ten miles from the general post office in London, and shall have been admitted three years, £9 (or if he shall not have been admitted three years, £4: 10*s*.): if he shall reside elsewhere, and shall have been admitted three years, £6 (or if he shall not have been so long admitted, £3).

(*f*) 6 & 7 Vict. c. 73, s. 23.

(*g*) Sect. 26. See Brunswick *v.* Crowl, 4 Exch. 492. Although not having a yearly certificate, an attorney may recover sums due for business not having reference to any suits or proceedings. (See Greene *v.* Reece, 8 C. B. 88.) It may be observed, that an attorney, who neglects to

The statute of 6 & 7 Vict. c. 73, also contains the following regulations;—among others of less general interest:—

That no attorney or solicitor shall have more than two clerks, bound by contract in writing as aforesaid, at one and the same time; nor any such clerk after he shall have left off business, or while he himself acts as a clerk: and that if he become bankrupt, or be imprisoned for debt for twenty-one days (*h*), the court may order his clerk to be discharged or assigned over to some other person (*i*).

That a person so bound as aforesaid as clerk for five years to an attorney, or solicitor, may serve one of those years as pupil with a practising barrister, or certificated special pleader, or with the London agent of the attorney or solicitor to whom he is bound (*j*).

That clerks whose masters have died or left off business during the term, or whose articles have been cancelled or discharged, may enter into new articles with other masters, which shall be available for the residue of the term (*k*).

That no attorney or solicitor, who shall be in prison, may, as such, commence or defend any action, suit, or proceeding in law, equity, or bankruptcy; or maintain an action for fees for any business done during such his confinement (*l*).

That no attorney or solicitor shall commence an action or suit for his fees or charges in respect of any business whatever, until after the expiration of one calendar month after a bill of his costs and charges, signed by him, shall

procure or renew his certificate for one whole year, cannot afterwards procure one from the Registrar, or cause his original one to be renewed, without the order of a court or judge. (As to this, see 6 & 7 Vict. c. 73, s. 25; and 23 & 24 Vict. c. 127, s. 23.) It has been decided, that proceedings taken by an uncertificated attorney are nevertheless valid (Sparling *v.* Brereton, Law Rep., 2 Eq. Ca. 64), and that his client's debt is not extinguished, but the remedy only taken away. (In re Jones, Law Rep., 9 Eq. Ca. 63.)

(*h*) See 32 & 33 Vict. c. 62, s. 4.

(*i*) 6 & 7 Vict. c. 73, ss. 4, 5.

(*j*) Sect. 6.

(*k*) Sect. 13. See Ex parte Wallis, 2 B. & Smith, 416.

(*l*) Sect. 31.

have been delivered to the party to be charged (*m*): and such party may, on a proper application, obtain an order referring such bill to be taxed, and staying all proceedings to recover the amount thereof in the meantime (*n*). An order may also be obtained directing an attorney or solicitor to deliver his bill (when he has not done so); and also an order for his delivering up, upon payment of what is due, all deeds, papers and documents in his possession or power touching the business in such bill comprised (*o*).

It is, however, provided that none of the above enactments shall extend to the examination, admission, rights, or privileges of any person appointed to be solicitor to the treasury, customs, excise, post-office, stamp duties, or any other branch of the revenue: or appointed solicitor of the city of London; or the assistant of the council for the affairs of the admiralty or navy; or the solicitor to the board of ordnance (*p*).

Moreover, by 33 & 34 Vict. c. 28 ("The Attornies and Solicitors Act, 1870"), an *agreement* with a client respecting the amount and manner of payment of past or future services is for the first time made legal. But there is a provision that bills sent in under such agreements must receive the sanction of a taxing officer, and the interests of third parties are not to be affected by such arrangements. By this Act, also, the attorney is for the first time permitted to take security from his client for future costs; and it moreover contains an express direction that on any taxation of costs the taxing officers may have

(*m*) 6 & 7 Vict. c. 73, s. 37. As to the delivery of an attorney's bill, in compliance with this section, see Cozens *v.* Graham, 12 C. B. 398; Haigh *v.* Ousey, 7 Ell. & Bl. 578. As to its delivery when the party to be charged is a joint-stock company, see Blandy *v.* De Burgh, 6 C. B. 623; Mant *v.* Smith, 4 H. & N. 324.

(*n*) Before this statute a bill was not liable to be taxed unless the whole or part of it was for business done in *court*. As to taxing bills for *agency* business, see Smith *v.* Dimes, 4 Exch. 32.

(*o*) 6 & 7 Vict. c. 73, s. 37. See Brooks *v.* Bockett, 9 Q. B. 847.

(*p*) Sect. 47; and see 23 & 24 Vict. c. 127, s. 16.

regard to the skill, labour and responsibility involved in the services rendered.

By 34 Vict. c. 18, the disability under which a practising attorney or solicitor previously laboured of being appointed justice of the peace for any county was taken away. This disability, it may be noticed, never extended so as to prevent him from being a justice in a county corporate, or in any city, town, liberty, or place having justices by charter, commission or otherwise.

CHAPTER XIV.

OF THE LAWS RELATING TO BANKS.

THE invention of banking appears to be due to the Republic of Venice. So early as the year 1171, Jews were accustomed there to keep benches in the market-place for the exchange of money and bills; and *banco* being the Italian for *bench*, banks may have taken their denomination from this circumstance.

In our own country, the business of banking was originally carried on chiefly by the goldsmiths; and accordingly we find it recited in an Act of the 22 & 23 Car. II. "that several persons, being goldsmiths and others, by "taking up or borrowing great sums of money, and lending out the same for extraordinary hire or profit, have "gained and acquired to themselves the reputation and "name of bankers" (*a*).

Afterwards, in the reign of William and Mary, the project was conceived, (in imitation, as it would seem, of the banks of Amsterdam and Genoa, already founded,) of establishing in England a national institution of the same description (*b*); and in 1694, parliament was accordingly prevailed upon, though with difficulty (owing to apprehensions then entertained of the policy of the measure), to pass an Act sanctioning the creation of that great corporate body, which has since become so celebrated,

(*a*) See Jacob's Dict. in tit. Bankers.

(*b*) Its principal projector was Mr. William Paterson, a Scotch gentleman.

under the denomination of "The Governor and Company of the Bank of England."

Our present laws relative to banking apply to the Bank of England, to private banks, and to certain establishments of recent origin, commonly denominated joint-stock banks. In proceeding to give some account of the legal history of the first, we shall be led by necessary connexion to notice that of the two latter also.

The Act already referred to as the origin of the Bank of England, was the 5 W. & M. c. 20. It empowered their Majesties to incorporate, by letters patent, "The Governor and Company of the Bank of England;" but lest the lieges should be oppressed by the said corporation, by their monopolizing or "engrossing any sort of goods, wares or merchandize,"—such corporation was prohibited from buying and selling goods (*f*). But the Act declared the Bank entitled, nevertheless, to deal in bills of exchange; or to buy and sell bullion, gold, or silver; or to sell any goods whatsoever, which should be left with it in pledge, and not redeemed at the time agreed upon, or within three months after; or to sell goods, the produce of lands which it should have purchased (*g*): and from the time of the passing of the Act, or soon afterwards, we find that the Bank began the practice, which it has ever since maintained, of issuing its own notes (*h*).

By subsequent Acts it was provided, that no other bank, or company in the nature of a bank, should be established by act of parliament within this kingdom (*i*); and that it should not be lawful in England for any other corporation (or for more than six persons united in partnership) to borrow, owe, or take up any money on their bills or notes, payable on demand, or at less time than six months from the borrowing thereof (*k*). And though these

(*f*) 5 W. & M. c. 20, s. 27.
(*g*) Sect. 28.
(*h*) See the Bank of England *v.* Anderson, 3 Bing. N. C. 653, 654.
(*i*) 8 & 9 Will. 3, c. 20; 15 Geo. 2, c. 13.
(*k*) 6 Ann. c. 22; 39 & 40 Geo. 3, c. 28.

exclusive privileges, (popularly called the Bank Charter,) have been since in part relinquished, they are also in part still extant, as we shall have occasion more particularly to explain in the course of the chapter.

Subject, however, to the Bank Charter, as from time to time modified, the trade of banking has, from its first introduction, been always free; and other banks, besides the Bank of England, have consequently been long established among us, and that both in London and the country; though, as between the country and the London banks, the following distinction has practically obtained, that some of the former have carried on business, like the Bank of England, as *banks of issue;* that is, have made payments by their own notes: while, on the other hand, the latter have been *banks of mere deposit;* that is, have made payments in cash and Bank of England notes only, and not in notes of their own.

The character of the Bank of England, and of its transactions, has always maintained, nevertheless, an importance far greater than that of any of these establishments (*l*): for while it has carried on the business ordinarily incident to banking,—such as taking deposits of money, issuing its own paper, and discounting mercantile bills, it has also been employed as a great engine of state, in paying the interest due to the public creditors (*m*),—for which it receives an allowance from the public (*n*); in circulating exchequer bills; in accommodating the government with immediate advances, on the credit of distant funds; and in assisting, generally, in

(*l*) See 35 & 36 Vict. c. 34, An Act to amend the Law relating to the Election of Directors of the Bank of England.

(*m*) See 33 & 34 Vict. c. 71; 34 & 35 Vict. c. 29, authorizing the bank to pay dividends by sending warrants through the post.

(*n*) As to the bank allowance for managing the public debt, see 24 & 25 Vict. c. 3, s. 2; 33 & 34 Vict. c. 71. By 24 & 25 Vict. c. 3, previous provisions on this subject contained in 48 Geo. 3, c. 4, and 56 Geo. 3, c. 97, and some of those contained in 7 & 8 Vict. c. 32, are repealed. As to the public debt, vide sup. vol. II. p. 574.

all the great operations of finance. Its advances to the government, however, are subject to the restrictions imposed by 59 Geo. III. c. 76: which enacts, in conformity with an early regulation (*p*), that it shall not be lawful for the Bank to advance or lend to the Crown money upon the credit of any government security, or in any other manner whatever, without the express and distinct authority of parliament for that purpose first obtained—but this is without prejudice to its right of *purchasing* exchequer bills or government securities, or of advancing upon the credit of exchequer bills lawfully issued such money as may be required to make good a deficiency in the Consolidated Fund at the close of any quarter of a year (*q*).

In the year 1797, owing to a temporary failure in public credit, and a consequent run upon the Bank, it was deemed necessary to restrain it for a limited period from making payments in cash; and an Act of parliament, 37 Geo. III. c. 45, was passed in that year for the purpose, the provisions of which were continued, by subsequent Acts, until the 1st of May, 1823, when the restriction ceased.

In the year 1826, the Bank was authorized to extend the circulation of its paper, by establishing, in the country, district banks of its own; which should be managed by its agents on the spot, and called *branches* of the Bank of England. On the other hand the Bank, at the same period, relinquished in part its exclusive privileges: so as to admit, (within certain limits, and subject to certain conditions,) the introduction of other banking companies, commonly denominated joint-stock banks (*r*). But all notes on demand of the Bank of England issued at any of its Branch banks must be made payable in coin at the

(*p*) 5 W. & M. c. 20, s. 30.

(*q*) See 59 Geo. 3, c. 19; 29 & 30 Vict. c. 39, s. 12. As to the consolidated fund, vide sup. vol. II. p. 578.

(*r*) So called, also, in the title of 1 & 2 Vict. c. 96, and 7 & 8 Vict. c. 113, &c.

place where such notes are issued; and though the Bank of England is not liable to pay at any of its branches notes not made specially payable at such branch bank, it is, on the other hand, bound to pay *in London* all notes whether those of the Bank of England itself, or of any of its branches (*s*).

The Bank Charter had been originally limited to determine upon twelve months' notice after 1st August, 1705; but this period was from time to time extended by successive Acts of parliament; though the charter was in some respects modified by one or other of such Acts of extension (*t*).

It deserves notice that by one of these statutes (3 & 4 Will. IV. c. 98) it was provided, that after the 1st August, 1834,—unless and until the legislature should otherwise direct,—tender of a note of the Bank of England, (expressed to be payable to bearer on demand,) should be a legal tender to the amount therein expressed, for all sums above *5l.*, so long as such bank continued to pay, on demand, their notes in legal coin; but this is made subject to a proviso, that such note shall not be a legal tender either by the bank itself or by any of its branches (*u*).

Such, succinctly stated, may be said to have been the course of the legislature in reference to banking in this country down to a recent period; but in the year 1844 was passed the Act of 7 & 8 Vict. c. 32, by which great and extensive changes in the law on this subject were introduced (*x*). For that statute laid down a new system of regulation, which affects not only the Bank of England, but all bankers whomsoever: its main object being to place the general circulation of the country

(*s*) 3 & 4 Will. 4, c. 98, ss. 4, 6.

(*t*) See the following statutes:—3 Geo. 1, c. 8; 15 Geo. 2, c. 13; 24 Geo. 2, c. 4; 4 Geo. 3, c. 25; 21 Geo. 3, c. 60; 39 & 40 Geo. 3, c. 28; 55 Geo. 3, c. 16; 56 Geo. 3, c. 96; 7 Geo. 4, c. 46; 3 & 4 Will. 4, c. 98; 7 & 8 Vict. c. 32.

(*u*) 3 & 4 Will. 4, c. 98, s. 6. As to the meaning of a *legal tender*, vide sup. vol. II. p. 521.

(*x*) See also 19 & 20 Vict. c. 20, and 17 & 18 Vict. c. 83, s. 11.

upon a sounder footing: to subject to reasonable restraint the issue of paper money; and to prevent as much as possible those fluctuations in the currency to which many of our commercial embarrassments have been ascribed (*y*).

First, then, as to the *Bank of England.* By this Act the Bank charter was continued; but it was again subjected to certain modifications; and made determinable by giving twelve months' notice (*z*), and on repayment by parliament of certain debts therein particularized. It also provided, that the issue of Bank of England notes payable on demand, should thereafter be kept distinct from the general banking business—that the Bank should, on the 31st August, 1844, transfer to its "issue department" securities to the value of 14,000,000*l.* (including the debt due to it by the public), and also so much of the gold coin, and gold and silver bullion (*a*), then held by it as should not be required by its banking department:—that, thereupon, there should be delivered out of the issue department into the banking department, such an amount of Bank of England notes as, together with those in circulation, should be equal to the aggregate amount of the securities, coin, and bullion so transferred to the issue department:—that the whole amount of its notes in circulation, (including those delivered to the banking department,) should be deemed to be issued on the credit of such securities, coin and bullion:—that the amount of such securities should not be increased, but might be diminished and again increased, so as not to exceed on the whole the sum of 14,000,000*l.* (*b*);—

(*y*) As to the policy of this Act of 1844, see an able article in the Edinburgh Review, in the year 1858, (No. 217).

(*z*) It was provided by the Act that this notice might be given by vote or resolution of the House of Commons at any time after 1st August, 1855. (7 & 8 Vict. c. 32, s. 27.)

(*a*) The silver bullion is not to exceed one-fourth of the gold coin and bullion (sect. 3).

(*b*) See post, p. 228, n. (*d*). In the year 1857, a great commercial emergency having arisen, so that the

and that after such transfer as just mentioned to its issue department, it should not be lawful for the Governor and Company to issue Bank of England notes, either into its banking department, or to any person whatever, save in exchange for other Bank of England notes, or gold coin, or gold or silver bullion, or securities acquired in the issue department under the provisions of the Act. The Act further provided, that an account of the notes issued by the issue department, and of the securities, gold coin and gold and silver bullion therein—and also of the capital stock and deposits, money and securities in the banking department—should be transmitted weekly to the commissioners of stamps and taxes, (now called the Board of Inland Revenue,) in such form as the Act prescribed, and published by them in the London Gazette. And by the same statute it was also provided, that all persons should be entitled to demand from the issue department of the Bank of England notes in exchange for gold bullion, at the rate of 3*l.* 17*s.* 9*d.* per ounce of standard gold (*c*).

As to *banks of issue* (other than the Bank of England): the Act of 1844 provided, that in future it should

Bank was unable to meet its demands for discounts and advances on approved securities without exceeding the limits prescribed by law, the governor and company of the Bank were informed by Government, that it was prepared to propose to parliament a bill to indemnify them from any such excess. Bank of England notes were accordingly issued in exchange for securities, beyond the amount limited by law; and parliament afterwards passed an Act indemnifying the Bank in that respect, and for a short suspension of so much of the Act of 1844 as limits the amount of such securities (see 21 & 22 Vict. c. 1). A similar crisis occurred previously in 1847, and, subsequently, in the year 1866,—on each of which occasions Government took the same course, though no actual infringement of the law took place on either, as the commercial panic subsided before the Bank had made advances in excess of their legal limits.

(*c*) 7 & 8 Vict. c. 32, s. 4. Vide sup. vol. II. p. 523. By sect. 7, the Bank of England is discharged from liability to *stamp* duty on their notes payable on demand. See, as to stamps on bankers' notes in general, 9 Geo. 4, c. 23; 17 & 18 Vict. c. 83; 33 & 34 Vict. c. 97.

not be lawful for any banker to draw, accept, make or issue any bill or note, or engagement for the payment of money, payable to bearer on demand—or to borrow, owe or take up any money, on his bills or notes payable to bearer on demand. But this prohibition was coupled with a proviso that it should be lawful for any banker, who on the 6th May in that year was carrying on the business of a banker, and was then lawfully issuing his own notes, to continue to issue them; though if he should become bankrupt, or cease to carry on the business, or discontinue the issue of notes, either by agreement with the Bank of England, or otherwise, his privilege in this respect was to be at an end, and incapable of revival. It also provided, that a banker issuing his own notes in virtue of the above proviso should not thereafter have in circulation a greater amount of notes than the average amount which he had circulated before the Act: such average to be ascertained in such manner as the Act specifies. And further, that if any such banker as last aforesaid should cease to issue his own notes, it should be lawful for her Majesty in council, upon application of the Bank of England, to authorize the Bank of England to increase the 14,000,000*l.* of securities in the issue department, in the proportion of two-thirds of the amount so withdrawn from circulation (*d*).

As to *banks in general*, it was provided by the same Act of 1844 (*e*), that every banker shall, on the 1st of January in every year, or within fifteen days after, make a return to the Board of Inland Revenue, of the name, residence and occupation of every member of the partner-

(*d*) 7 & 8 Vict. c. 32, s. 5. Under this provision and an order in council issued thereunder, the sum of 14,000,000*l.* had, in December, 1857, become increased to 14,475,000*l.* (See the preamble to 21 & 22 Vict. c. 1.)

(*e*) 7 & 8 Vict. c. 32, s. 21. The Bank of England is not subject to this regulation.

ship; of the name of the firm; and of the place where the business is carried on: and that such board shall, on or before the 1st of March in every year, publish the same in some newspaper circulating either in the town or county.

Another Act which affects banks is the Companies Act, 1862 (25 & 26 Vict. c. 89), to our general account of which (as amended by 30 & 31 Vict. c. 131) the reader is referred (*f*). These statutes relate, as we have seen, both to banks and other companies, and so far as their regulations are not pointed exclusively at the former, an examination of what is there said will be sufficient. But the Act first named has regulations which concern banks exclusively, and of these it is proper here to take notice.

First, it is enacted, that no company or association consisting of more than ten persons shall be formed for the purpose of carrying on the business of banking, unless registered as a company under that Act, or formed in pursuance of some other Act or of letters-patent (*g*).

Secondly, that no banking company claiming to *issue notes* in the united kingdom, shall be entitled to *limited* liability in respect of such issue, but shall continue subject to unlimited liability in respect thereof; and if necessary the assets shall be marshalled for the benefit of the general creditors, and the members shall be liable for the whole amount of the issue in addition to the sum for which they would be liable as members of a limited company (*h*).

Thirdly, that every banking company *existing at the date of the passing of the Act*, which registers itself as a *limited* company, shall, at least thirty days previous to obtaining a certificate of registration with limited liability, give notice that it is intended so to register the same, to every person and partnership firm who have a banking

(*f*) Vide sup. p. 20.

(*g*) 25 & 26 Vict. c. 89, s. 4.

(*h*) Sect. 182.

account with the company—such notice to be given in such manner as the Act directs.

We have also to mention the 27 & 28 Vict. c. 32, an Act passed in order to enable certain banking co-partnerships, discontinuing the issue of their own notes, to sue and be sued in the name of their public officer. And, finally, the 30 & 31 Vict. c. 29, to which we have made some reference in a former volume and which contains certain regulations with regard to the sale and purchase of the shares in joint-stock banking companies (*i*).

(i) Vide sup. vol. II. p. 76.

CHAPTER XV.

OF THE LAWS RELATING TO THE REGISTRATION OF BIRTHS, DEATHS, AND MARRIAGES.

THE registration of births, deaths, and marriages,—a practice so important in every country, for the authentication of the civil rights of individuals, and the promotion of many objects connected with the science of political economy,—has been but recently introduced among us: though another species of registration, having reference to baptisms, burials, and marriages, had been long in use; and is, in regard to the two former ceremonies, still in force. It is to this more antient method, which, (as connected with the offices of the Church, and originally directed by the canon law,) may be termed the *ecclesiastical*, that we shall first advert; and our attention will next be directed to the new method of registering births, deaths, and marriages, which may be termed, by way of distinction from the former, the *civil*.

I. As to the ecclesiastical mode of registration.

This system is said to be coeval with the Protestant Church; having been first established by Cromwell, Lord Vicegerent, in the thirtieth year of Henry the eighth, 1538 (*a*). Various enactments for its confirmation were passed in succeeding reigns; and by a canon (*b*) in the time of James the first, still in force, and by several statutes, particularly 52 Geo. III. c. 146, further provisions were made for its regulation.

(*a*) Godolph. Abridg. 144. (*b*) Canon 70, 1 Jac. 1, 1607.

This statute, so far as it relates to the registry of *marriages*, was repealed on the introduction of the civil method hereafter to be described; but it still remains in force as regards *baptisms* and *burials* (*c*), and provides, that registers of public and private baptisms and burials, solemnized according to the rites of the established Church, in any parish or chapelry in England, shall be made by the rector, vicar, curate or other officiating minister of the parish, in books of parchment or durable paper; wherein such particulars shall be inscribed,—within seven days at the latest after the ceremony (*d*),—and in such form and manner as in the schedule to the Act annexed are set forth (*e*).

In cases where the baptism or burial is performed in any place other than the parish church or churchyard, by a clergyman not being the rector, vicar or curate of the parish, he must transmit on that or the following day a certificate, that he has performed such ceremony, to the minister of the parish, who shall duly enter it among the parish registers (*f*).

The books wherein such entries are made are to be carefully preserved by the officiating minister in a dry well-painted iron chest; and are not to be removed therefrom except for the purpose of making such entries, or other such specific purposes as mentioned in the Act (*g*).

An annual copy of the contents of these register books, certified by the minister, is to be transmitted by the churchwardens, by post, to the Registrar of the diocese (*h*); who is bound to make report to the bishop

(*c*) 6 & 7 Will. 4, c. 86, s. 1. See 16 & 17 Vict. c. 134, s. 8, in reference to the registration of such burials as are had in ground provided under the *Burial Acts*, (cited sup. p. 178, n.)

(*d*) 52 Geo. 3, c. 146, s. 3.

(*e*) Sect. 1.

(*f*) Sect. 4. It is enacted, by 20 & 21 Vict. c. 81, s. 16, that this provision shall not apply where the ceremony of burial is performed in ground provided under the Burial Acts.

(*g*) 52 Geo. 3, c. 146, s. 5.

(*h*) The registrar of every vicar-

whether he has duly received such copy or not (*i*). And alphabetical lists of the entries are directed to be made out by such registrar; which are to be open to public search at reasonable times upon payment of certain fees (*k*).

It has also been enacted, that any person who knowingly inserts any false entry into these registers or the certified copies, or who forges any part thereof, or wilfully destroys or injures the same, or knowingly certifies any fraudulent or defective copy, shall be guilty of felony: and he is liable to penal servitude for life, or not less than five years; or to imprisonment, with or without hard labour and solitary confinement, to the extent of two years (*l*).

The statute of George the third extends only to such burials as are performed according to the rites of the established Church, but by 16 & 17 Vict. c. 134, there are also provisions for the registration of such interments as take place in grounds provided by the Burial Acts (*m*); and now by 27 & 28 Vict. c. 97, for such as take place in any burial-ground in England whatever,—the duty being (where not otherwise provided for) thrown on the company, body, or persons to whom such burial-ground belongs, and the register-books being directed to be sent from time to time to the registrar of the diocese.

II. Of the civil system of registration.

The above is a brief account of the ecclesiastical and more antient method of registration; but the entries thereby obtained were found in fact to be often both incomplete and inaccurate, and otherwise inadequate to the

general or diocese has also, by 7 & 8 Vict. c. 68, s. 2, to transmit a yearly report of his fees, &c. to a principal secretary of state.

(*i*) See 52 Geo. 3, c. 146, s. 14; 24 & 25 Vict. c. 98, ss. 36, 37; 27 & 28 Vict. c. 47.

(*k*) 52 Geo. 3, c. 146, s. 12. See Steele *v.* Williams, 8 Exch. 625.

(*l*) 24 & 25 Vict. c. 98, ss. 36, 14.

(*m*) These Acts are cited sup. p. 178, n.

purposes designed,—being, (among other objections,) commemorative not of births and deaths generally, but only of such as are attended with the proper ceremonies of the church. Accordingly, on the 28th of March, 1833, a committee of the House of Commons was appointed to consider and report upon "the general state of parochial "registers, and the laws relating to them, and on a general "registration of births, baptisms, deaths, and marriages "in England and Wales;" and the report of this body led to the introduction, (wholly independent of and co-existent with the method for registering baptisms and burials above mentioned,) of the system for registering *births, marriages, and deaths*, which we are about to describe.

The statutes which contain the law upon this subject are the 6 & 7 Will. IV. cc. 85, 86, the 7 Will. IV. & 1 Vict. c. 22, and the 21 & 22 Vict. c. 25 (*o*).

By these Acts every poor law union or parish is divided into registration districts, each of which is called by a distinct name, and possesses a *Registrar*, resident therein (*p*).

The Registrars of each union are subjected to the supervision of their "Superintendent Registrar,"—an office to be filled as of right, (in case of his due qualification and acceptance,) by the clerk to the guardians of the union, during the pleasure of the Registrar-general (*q*).

These superintending registrars are in their turn subjected to the authority of an officer, to be appointed under the Great Seal,—and to hold office during the pleasure of the crown,—called "the Registrar-general of births, deaths, and marriages in England" (*r*); to whom, subject to such regulations as shall be made by a principal secre-

(*o*) As to 6 & 7 Will. 4, c. 85, intituled "An Act for Marriages in England," vide sup. vol. II. p. 250.

(*p*) Sects. 7, 10, 11, 16. As to the position of this officer, see 29 & 30 Vict. c. 113, s. 1.

(*q*) 6 & 7 Will. 4, c. 86, ss. 7, 10, 11, 16. As to the position of the "Superintendent Registrar," see 29 30 & Vict. c. 113, s. 1.

(*r*) 6 & 7 Will. 4, c. 86, s. 2.

tary of state (*s*), the general management of the whole system, and of the practical details of carrying it out (where no specific directions are given by the Acts), are entrusted.

Provision is also made by the Acts, for the establishment of a proper office, to be called the "General Register Office" (*t*); and of register offices for each union (to be placed under the respective Superintendents), for the preservation and safe custody of the registers when collected (*u*). And the Acts also contain regulations as to the uniform construction and durable materials of the *books* wherein the entries are to be made (*x*).

Such is an outline of the machinery of the system—the practical working out of which depends, it will be seen, in the first instance, upon the *Registrars*.

Their duties are threefold.

1. As to *births*.—Every Registrar is authorized and required to inform himself carefully of every birth which shall happen in his district; and to learn and register, as soon after the event as may conveniently be done, such particulars as are required, by the schedule annexed to the 6 & 7 Will. IV. c. 86, to be registered touching such birth (*y*). And the father or mother of any child born,—or the occupier of any house in England wherein any child shall be born,—*may*, within forty-two days after the day of such birth, give notice thereof to the Registrar of the district (*z*). And within the same period, the father or mother of any child born in England—or, in case of their death or other inability, the occupier of the house—*shall*,—upon being requested so to do,—give information,

(*s*) 6 & 7 Will. 4, c. 86, s. 5.

(*t*) By 15 & 16 Vict. c. 25, this office may be established in any place or places that may appear to the commissioners of the treasury to be fit and convenient.

(*u*) 6 & 7 Will. 4, c. 86, s. 9.

(*x*) Sect. 17.

(*y*) Sect. 18. It was held by Lord Romilly that the entry of a birth on the register was evidence of the birth having taken place at some time before registration, but not as to its exact date. (In re Wintle, Law Rep., 9 Eq. Ca. 373.)

(*z*) 6 & 7 Will. 4, c. 86 s. 19.

to the best of his or her knowledge and belief, of the several particulars required to be known and registered touching the birth of such child (*a*).

After the expiration of the above-mentioned period of forty-two days, registration may still take place; but in this case a solemn declaration as to the truth of the particulars required must be made by the father or guardian, or some person present at the birth (*b*); and the entry of the birth must, in that case, be signed not only by the Registrar but by the Superintendent Registrar; and a fee is payable to each of these officers by the person requiring the registry to be made (*c*). But after the expiration of six calendar months from the time of the birth, no registry thereof can upon any pretence be made,—except only in the case of a child born at sea (*d*).

2ndly. As to *marriages*.—The forms as to the registration of marriages were incidentally described in a former part of the work, so far as to supersede the necessity of now recurring to them (*e*); and it therefore only remains to advert to the duties of the Registrar—

3rdly. As to *deaths*.—Every Registrar is authorized and required to inform himself carefully of every death which shall happen in his district; and to learn and register, as soon after the event as conveniently may be done, such particulars concerning the same as are specified in the schedule annexed to 6 & 7 Will. IV. c. 86 (*f*). And the occupier of every house in England, in which any death shall happen, *may*, within five days after the day of such death, give notice thereof to the Registrar of the district (*g*). And some person present at the death, or in attendance during the last illness,—or in default of any such person, the occupier of the house in which the

(*a*) 6 & 7 Will. 4, c. 86, s. 20. Upon pain of being liable to an indictment for a misdemeanor. (See R. *v.* Price, 11 Ad. & El. 727.)
(*b*) Sect. 22.
(*c*) Ibid.
(*d*) Sect. 23.
(*e*) Vide sup. vol. II. p. 258.
(*f*) Sect. 18.
(*g*) Sect. 19.

death has happened, (or if the occupier be the person dying, then some inmate thereof,) *shall*—within eight days after the day of the death—give information, (upon being requested so to do,) to the Registrar, according to the best of his or her knowledge and belief, touching such particulars as are required to be known and registered touching the death. And in the case of an inquest upon the body, such information is to be conveyed to the Registrar by the coroner before whom such inquest is held (*h*).

It is further provided, that four times in every year, each district Registrar shall deliver to his Superintendent a certified copy of the entries therein,—and finally the register itself, upon the book being filled (*i*). And that the Superintendent, at the same intervals, shall transmit the same to the Registrar-general (*k*).

The duties of this last-mentioned officer, into whose hands the documents thus ultimately fall, consist,—in addition to the general supervision of the working of the whole system,—in examining, arranging and indexing the certified copies so sent. He has also to compile abstracts of their contents, and to transmit the same once in every year to a principal secretary of state; by whom such abstracts are afterwards to be laid before parliament (*l*).

The abstracts which have been thus delivered by the Registrar-general for the information of the public, are the more valuable from its having been required, (as a matter of official regulation,) that, in the registers of deaths, a medical statement in each instance of the *cause* of death should be annexed,—in addition to the particulars required by the statute. This part of the information obtained under the new system seems calculated to advance, in a very important degree, the interests of mankind; by furnishing accurate data, upon a large scale, to those who are engaged in nosological inquiries, or in

(*h*) Sect. 25. As to this, see 21 & 22 Vict. c. 25, s. 5.
(*i*) 6 & 7 Will. 4, c. 86, s. 32.
(*k*) Sect. 34.
(*l*) Sect. 6.

endeavours to improve the sanitary condition of the labouring classes.

Before we conclude this chapter, we may remark, that, at the time of the introduction of the new system of civil registration above explained, certain commissioners were appointed for inquiring into the state and authenticity of any registers (other than parochial) which at that time existed. This commission succeeded, in the course of a few years, in discovering about 7,000 which were deemed authentic; and the documents so discovered were, by 3 & 4 Vict. c. 92, placed under the care of the Registrar-general,—together with records of the marriages and baptisms heretofore performed in the Fleet and King's Bench prisons, and at other irregular places. And the same statute provides, that all registers and records deposited in the General Register Office by virtue of that Act, except such registers as therein particularized of marriages and baptisms at the Fleet and elsewhere,—shall be deemed to be in legal custody; and shall be receivable in evidence in all courts of justice, subject to the provisions of that Act (*m*).

(*m*) 3 & 4 Vict. c. 92, s. 6. And see 21 & 22 Vict. c. 25, s. 3.

BOOK V.

OF CIVIL INJURIES.

CHAPTER I.

OF THE REDRESS OF INJURIES BY THE MERE ACT OF THE PARTIES.

AT the opening of these Commentaries, the objects of municipal law were considered as consisting in the establishment and maintenance of the *rights* severally due to the different members of the community; rights having been previously defined as the liberties and advantages guaranteed, by the implied contract of society, to each individual, in return for his submission to those laws by which the same rights are secured to his fellow citizens(*a*). And this occasioned the distribution of our laws into two portions; one relating to *rights;* and the other to violation of rights, or (in more ordinary language) *wrongs.*

In the consideration of the first of these subjects, *rights* were distinguished into four kinds, viz. 1, Personal rights; 2, Rights of property; 3, Rights in private relations; 4, Public rights;—and these have respectively formed the subject of the four preceding Books. We are now, therefore, to proceed to the examination of *wrongs,* an inquiry

(*a*) Vide sup. vol. I. pp. 29, 136.

evidently posterior in its nature to the former, as right is the positive idea of which wrong is the mere privation; and the two subjects stand in the same connection with each other as *jus* with *injuria*, or *fas* with *nefas* (*b*).

Wrongs—as we had also occasion before to remark (*c*) —are divisible into two sorts; *civil injuries* and *crimes*. The former are the violations of rights, when considered in reference to the injury sustained by an individual, and consequently as subjects for *civil redress* or *compensation*: the latter are the violations of rights, when considered in reference to the evil tendency of such violation as regards the community at large, and accordingly as fit subjects for *punishment* (*d*). To investigate the first of these species of wrongs, with their appropriate remedies, or modes of redress, will be our employment in the present Book; and the other species will be reserved till the sixth and concluding Book of these Commentaries.

[The more effectually to accomplish the redress of injuries, courts of justice are instituted in every civilized society, in order to protect the weak from the insults of the stronger, by expounding and enforcing those laws by which rights are defined, and wrongs prohibited. This remedy is therefore principally to be sought by application to these courts of justice. For which reason our chief employment in the present Book, will be to consider the redress of private wrongs, by *suit* or *action* in courts. But as there are certain injuries of such a nature that some of them permit, and others require, a more speedy

(*b*) 3 Bl. Com. 2.

(*c*) Vide sup. vol. I. pp. 137, 138.

(*d*) According to Blackstone, (vol. iii. p. 2,) "the former are an "infringement or privation of the "private or civil rights belonging "to individuals, considered as indi- "viduals. The latter are a breach "and violation of public rights and "duties which affect the whole com- "munity, considered as a commu- "nity." But there is an inaccuracy in this form of definition. It makes the difference depend on the nature of the right violated. But it is clear that a violation of the *same* right will sometimes amount to a civil injury and sometimes to a crime,—as in the case of a battery.

[remedy, than can be had in the ordinary forms of justice, there is allowed in those cases an extra-judicial or eccentrical kind of remedy. Of these we shall first of all treat, before we consider the several remedies by suit; and, to that end, shall distribute the redress of private wrongs into three several species—first, that which is obtained by the *mere act* of the *parties* themselves: secondly, that which is effected by the *mere act* and operation of *law*: and, thirdly, that which arises from *suit* or *action* in courts; which consists in a conjunction of the other two, the act of the parties co-operating with the act of law.

And, first, of that redress of private injuries which is obtained by the mere act of the parties. This is of two sorts; first, that which arises from the act of the injured party only; and, secondly, that which arises from the joint act of all the parties together: both of which we shall consider in their order.

Of the first sort, or that which arises from the sole act of the injured party, is,

I. The *defence* of one's self, or the mutual and reciprocal defence of such as stand in the relations of husband and wife, parent and child, master and servant. In these cases, if the party himself, or any of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force; and the breach of peace which happens, is chargeable upon him only who began the affray (*e*). For the law, in this case, respects the passions of the human mind; and (when external violence is offered to a man himself, or those to whom he bears a near connection,) it makes it lawful in him to do himself that immediate justice, to which he is prompted by nature, and which no prudential motives are

(*e*) 2 Roll. Abr. 546; 1 Hawk. P. C. 131. But see Bac. Abr. Master and Servant (P), where it is observed that, on the master's right to defend the servant, there has been a difference of opinion.

[strong enough to restrain. It considers, that the future process of law is by no means an adequate remedy for injuries accompanied with force; since it is impossible to say to what wanton lengths of rapine or cruelty outrages of this sort might be carried, unless it were permitted a man immediately to oppose one violence with another. Self-defence, therefore, as it is justly called the primary law of nature, so it is not, neither can it be in fact, taken away by the law of society. In the English law particularly, it is held an excuse for breaches of the peace, nay, even for homicide itself; but care must be taken, that the resistance does not exceed the bounds of mere defence and prevention; for then the defender himself would become an aggressor (*f*).

II. *Recaption* or *reprisal* is another species of remedy by the mere act of the party injured. This may be resorted to when any one hath deprived another of his property in goods, or wrongfully detains his wife, child, or servant; in which case the owner of the goods, and the husband, parent, or master, may lawfully claim and retake them, wherever he happens to find them; so it be not in a riotous manner, or attended with a breach of the peace (*g*). The reason for this is obvious; since it may frequently happen that the owner may have this only opportunity of doing himself justice: his goods may be afterwards conveyed away or destroyed — and his wife, children, or servants, concealed or carried out of his reach —if he had no speedier remedy than the ordinary process of law. If, therefore, he can so contrive it as to gain possession of his property again, without force or terror, the law favours and will justify his proceeding. But as the public peace is a superior consideration to any one

(*f*) 1 Hale, P. C. 485, 486. Vide post, vol. IV. pp. 54—59.

(*g*) If an action be brought for an assault committed in such recaption, it may be successfully answered by showing that no *unnecessary* violence was used. (See Blades v. Higgs, 10 C. B., N. S. 713.)

[man's private property; and as, if individuals were once allowed to use private force as a remedy for private injuries, all social justice must cease,—the strong would give law to the weak, and every man would revert to a state of nature; for these reasons it is provided, that this natural right of recaption shall never be exerted, where such exertion must occasion strife and bodily contention, or endanger the peace of society.] If, for instance, my horse is wrongfully taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but (except he be feloniously stolen) I cannot justify breaking open a private stable, or entering on the grounds of a third person, in order to recover his possession. My only remedy is to have recourse to an action, in which I may recover his value with damages for his detention (*h*).

III. [As recaption is a remedy given to the party himself, for an injury to his *personal* property, so a remedy of the same kind for injuries to *real* property, is by *entry* on lands, when another person without any right has taken possession thereof. In this case, which depends in some measure on like reasons with the former, the party entitled may make a formal but peaceable entry on the lands, declaring that thereby he takes possession, which notorious act of ownership is equivalent to a feodal investiture by the lord (*i*). Or he may enter on any part of the property, declaring it to be in the name of the whole: but if the estate lies in different counties, he must make different entries; for the notoriety of such entry or claim to the *pares* or freeholders of Westmoreland, is not any notoriety to the *pares* or freeholders of Sussex (*k*). Also, if there be two disseisors, the party disseised must make

(*h*) Higgins *v.* Andrews, 2 Roll. R. 55, 56; Masters and Powlie's case, ibid. 208; 2 Roll. Abr. 565, 566.

(*i*) As to the time within which an entry may be made, after the right of entry accrues, see 3 & 4 Will. 4, c. 27.

(*k*) Co. Litt. 252 b; 3 Bl. Com. 175.

[his entry on both; or if one disseisor has conveyed the lands with livery to two distinct feoffees, entry must be made on both (*l*); for as their seisin is distinct, so also must be the act which divests that seisin. But no entry can in the nature of things be made on hereditaments *incorporeal* (*m*); and in every case where this remedy is available, it must be pursued in a peaceable and easy manner; and not with force or strong hand (*n*). For, if one turns another out of possession forcibly, this amounts to a breach of the peace and is punished accordingly (*o*).

IV. A fourth species of remedy by the mere act of the party injured, is when he *abates*, that is removes, a nuisance. What nuisances are, and their several species, we shall find a more proper place to inquire under one of our subsequent divisions (*p*). At present we shall only observe, that whatsoever unlawfully annoys or doth damage to another, is a nuisance: and that such nuisance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it (*q*); nor occasions—in case of a *private* nuisance—any damage, beyond what the abatement necessarily requires (*r*). Thus if a house or a wall is erected by my neighbour, so near to mine that it stops my antient lights, I may enter his land and peaceably pull it down (*s*); or if the boughs of his tree are allowed to grow so as to overhang my land, which they had not been accustomed to do, I may, on his refusal to remove such part of them as are in that position, effect the removal myself (*t*). Or if a

(*l*) Co. Litt. 252.

(*m*) 3 Bl. Com. 206.

(*n*) See Newton *v.* Harland, 1 Man. & G. 644; Harvey *v.* Bridges, 14 Mee. & W. 442.

(*o*) See 5 Rich. 2, st. 1, c. 8; 15 Rich. 2, c. 2; 8 Hen. 6, c. 9, and 31 Eliz. c. 11. See also 4 Inst. 176; 21 Jac. 1, c. 15; R. *v.* Wilson, 3 Ad. & Ell. 811, and R. *v.* Harland, ib. 826.

(*p*) Vide post, bk. v. c. VII.

(*q*) 2 Rep. 101; 9 Rep. 55; Houghton *v.* Butler, 4 T. R. 364.

(*r*) See Cooper *v.* Marshall, 1 Burr. 261; Lodie *v.* Arnold, 2 Salk. 458.

(*s*) R. *v.* Rosewell, 2 Salk. 459.

(*t*) Norris *v.* Baker, 1 Roll. Rep. 394; Lodie *v.* Arnold, ubi sup. As

[new gate be erected across the public highway, any person passing that way may cut it down and destroy it (*u*). And the reason why the law allows this private and summary method of doing justice is, because injuries of this kind require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice.

V. A fifth way in which the law allows a man to be his own avenger, or to minister redress to himself, is by allowing him to *distrain* the goods of another for non-payment of rent or other duties, or to distrain his cattle *damage feasant*, that is, doing damage or trespassing upon land. The former species of distress is intended for the benefit of the landlord, to prevent tenants from secreting or withdrawing their effects to his prejudice; the latter kind arises from the necessity of the thing itself, as it might otherwise be impossible, at a future time, to ascertain whose cattle they were that committed the trespass or damage.

As the law of distresses (or the taking of a personal chattel out of the possession of the wrongdoer into the custody of the party injured to procure satisfaction for a wrong suffered) is a point of great use and consequence, it shall be considered with some minuteness: by inquiring, first, for what injuries a distress may be taken (*v*); secondly, what things may be distrained; and, thirdly, the manner of taking, disposing of, and avoiding distresses.

The most usual injury for which a distress may be taken, is that of non-payment of rent. It was observed in a former volume, that distresses were incident, by the common law, to every *rent service*, and, by particular reservation, to *rent charges* also; and that by statute

to trees overhanging public ways, see 5 & 6 Will. 4, c. 50, s. 65.

(*u*) James *v.* Hayward, Cro. Car. 184.

(*v*) The thing itself taken by this process, as well as the process itself, is in our law books very frequently called a *distress*.

[4 Geo. II. c. 28, the same remedy was also extended in general to *rent seck, rents of assize,* and *chief rents* (*b*). So that we may lay it down as an universal principle that a distress may now be taken for any kind of rent in arrear: the detaining whereof beyond the day of payment is an injury to him that is entitled to receive it (*c*).] But as it is of the definition of rent, that its amount shall be certain or at the least be capable of being readily reduced by either party to certainty, so it is held that where the sum to be paid by the occupier is not fixed by agreement, but depends on what shall be considered as a reasonable compensation for the use and occupation of the premises,—no distress for it can legally be made (*d*). [And another injury, for which distresses may be taken, is where a man finds beasts of a stranger wandering in his grounds *damage feasant* (*e*); that is, doing him hurt or damage, by treading down his grass or the like; in which case, supposing the trespass not to be rendered excusable by the defective state of the fences, or the like (*f*), the owner of the soil may distrain them, while they so remain

(*b*) Vide sup. vol. I. pp. 674—676. As to distress for rent service, see Giles *v.* Spencer, 3 C. B. (N. S.) 244.

(*c*) See Bradbury *v.* Wright, 2 Doug. 624; Newman *v.* Anderton, 2 N. R. 224; Buttery *v.* Robinson, 3 Bing. 392. Rent is said to be *in arrear* if it remain unpaid at any time after the expiration of the year, quarter, or other period, at which it may have been made payable. Thus in a *yearly* tenancy, and with absence of any express stipulation to the contrary, it is not in arrear till after the expiration of the year. (See Buckley *v.* Taylor, 2 T. R. 600; Collett *v.* Curling, 10 Q. B. 785.)

(*d*) See Regnart *v.* Porter, 7 Bing. 451; Warner *v.* Pochett, 3 B. & Adol. 928; Dunk *v.* Hunter, 5 B. & Ald. 322. As to the term within which a distress may be made after the right to distrain accrues, see 3 & 4 Will. 4, c. 27, ss. 2, 3, 42; James *v.* Salter, 2 Bing. N. C. 505; 3 Bing. N. C. 544. As to distraining for an *apportioned* rent, see Neale *v.* Mackenzie, 1 Mee. & W. 758; Revis *v.* Watson, 5 Mee. & W. 255.

(*e*) It seems however that the common law right of distress for damage feasant is not confined to *cattle*, but may extend to inanimate things doing damage (see Ambergate, &c. Railway Company *v.* Midland Railway Company, 2 Ell. & Bl. 793).

(*f*) 2 Wms. Saund. 284 e, note (4).

[on his grounds, till satisfaction be made him for the injury he has thereby sustained (*g*).

Secondly: as to the things which may be taken in distress, we may lay it down as a general rule, that all chattels personal may be taken unless particularly protected or exempted. Instead, therefore, of mentioning what things are distrainable, it will be easier to recount those which are not so, with the reason of the particular exemption (*h*). And, 1. As everything which is distrained is presumed to be the property of the wrongdoer, it will follow that such things as were formerly considered as having no intrinsic value, or wherein a man could have no absolute property, (as dogs, cats, rabbits, and the like, and all animals *feræ naturæ*,) cannot be distrained. Yet if deer, (which are of such nature,) are kept in a private inclosure for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandize, that they may be distrained for rent (*i*). 2. Whatever is in the personal use or occupation of any man, is for the time privileged and protected from any distress, in order to prevent the danger, which might otherwise arise, of a breach of the peace (*k*); as, for example, an axe with which a man is cutting wood, or a horse while a man is riding him (*l*). 3. Things delivered to a person following a public

(*g*) Besides those mentioned in the text, there may also be a distress for a neglect to do suit to the lord's court, or to pay the amercements imposed by a court leet, or (if warranted by prescription) by a court baron (see Co. Litt. 96; 2 Wms. Saund. 168, n. (1); Bro. Abrid. in tit. Distresses, 15). And there are moreover other kind of distresses introduced, in special cases, for recovery of duties and penalties imposed by act of parliament,—as for the assessments made by commissioners of sewers (7 Ann. c. 10; 24 & 25 Vict. c. 133, s. 38), or for the relief of the poor (43 Eliz. c. 2; 17 Geo. 2, c. 38, s. 7; 4 & 5 Will. 4, c. 76, s. 49).

(*h*) Co. Litt. 47.

(*i*) Davies *v.* Powel, C. B. Hil. 11 Geo. 2; Willes, 47.

(*k*) Storey *v.* Robinson, 6 T. R. 138; Co. Litt. ubi sup.

(*l*) It is laid down by Blackstone, (vol. iii. p. 8,) on the authority of a case in 1 Sid. 440, that a horse may be distrained while his rider is upon him. But the contrary is the law. (Storey *v.* Robinson, ubi sup. And see Field *v.* Adames, 12 Ad. & El. 649.)

[trade, to be carried, wrought, or managed in the way of such his trade, shall not be liable to distress for rent owing from the person to whom they have been so delivered (*n*); as a horse sent to a smith to be shoed, or standing in a common inn; or cloth in a tailor's house (*o*); or corn sent to a mill or market; or goods sent to an auctioneer to be by him sold (*p*).] For all these are protected and privileged for the benefit of trade; and are supposed in common presumption not to belong to the tradesman, but to his customers. But until recently it was the law (subject to the above exceptions) that whatever goods and chattels the landlord found upon the premises, whether they in fact belonged to the tenant or a stranger, were distrainable by such landlord for rent (*q*); and the stranger was left to *his* remedy over by action against the tenant, if by such tenant's default his chattels were distrained. This is still the law, generally speaking, but the doctrine has now been qualified by the 34 & 35 Vict. c. 79, in favour of *lodgers* distrained upon by the superior landlord; and it is provided that a lodger, whose goods and chattels have been so distrained for arrears of rent due by his immediate landlord, may serve the superior landlord or the bailiff with a written declaration that his immediate landlord has no right of property or beneficial interest in that which has been distrained, but that it is the property or in the lawful possession of the lodger; and stating the amount of rent, if any, due by the lodger to his immediate landlord. And if after service of such declaration, and the payment or tender of the rent stated to be due

(*n*) See Simpson *v.* Hartopp, Willes, 512; Gisbourn *v.* Hurst, 1 Salk. 250; 2 Wms. Saund. 290, n. (*f*); 1 Smith's Leading Cases, 187; Muspratt *v.* Gregory, 3 Mee. & W. 677; Joule *v.* Jackson, 7 Mee. & W. 454; Gibson *v.* Ireson, 3 Q. B. 39; Finden *v.* M'Laren, 6 Q. B. 891.

(*o*) See Read *v.* Burley, Cro. Eliz. 549.

(*p*) Williams *v.* Holmes, 8 Exch. 861.

(*q*) So held as to horses or carriages standing in a livery stable; see Francis *v.* Wyatt, 3 Burr. 1498; Crosier *v.* Tomkinson, 2 Kent, 439; Parsons *v.* Gingell, 4 C. B. 545.

to the immediate landlord, the superior landlord or the bailiff shall proceed with the distress, he shall be deemed guilty of an illegal distress, and the goods recovered by the lodger on the order of two justices or a stipendiary magistrate. And even at common law, the following distinctions are taken in reference to a distress by the superior landlord on the *beasts* of a stranger found on his tenant's land. [If they be put in by consent of the owner of the beasts, they are distrainable immediately afterwards for rent in arrear by the landlord. And if the stranger's cattle break the fences, and commit a trespass by coming on the land, they are distrainable immediately by the superior landlord, for his tenant's rent; as a punishment to the owner of the beasts, for the wrong committed through his negligence (*r*). But if the lands were not sufficiently fenced, so as to keep out cattle, such landlord cannot distrain them for rent till they have been *levant* and *couchant* (*levantes et cubantes*) on the land; that is, have been long enough there to have laid down and risen up to feed; which in general is held to be one night at least; and then the law presumes, that the owner may have notice that his cattle have strayed, and it is his own negligence not to have taken them away (*s*). Yet if the obligation to repair the fences lay on such landlord or his tenant, in this case, though the trespassing cattle may have been *levant* and *couchant*, yet they are not distrainable for rent till actual notice is given to the owner that they are there, and he neglects to remove them (*t*): for the law will not suffer the landlord to take advantage of his own or his tenant's wrong (*u*). 4. Things in the custody of the law, such as property already taken *damage feasant* or in execution, are not distrainable (*x*). 5. Money is not dis-

(*r*) Co. Litt. 47.

(*s*) Gilb. Dist. by Hunt, 3rd ed. 47.

(*t*) Hemp *v.* Crewes, 2 Lutw. 1580.

(*u*) See Poole *v.* Longueville, 2 Saund. 289.

(*x*) Co. Litt. 47 a; Smith *v.* Russell, 3 Taunt. 400; Wright *v.* Dewes, 1 Ad. & Ell. 641. See also 56 Geo.

[trainable, unless it has been placed in a *sealed bag* (*y*). 6. Nothing shall be distrained for rent, which may not be rendered again in as good plight as when it was distrained (*z*): for which reason milk, fruit, and the like, cannot be distrained; a distress being originally considered as only in the nature of a pledge or security, to be restored in the same plight when the debt is paid. So, antiently, sheaves or shocks of corn could not be distrained, because some damage must needs accrue in their removal; though a cart loaded with corn might, as that could be safely restored. But now, by statute 2 W. & M. c. 5, corn as soon as it is reaped, and also hay, may be distrained, as freely as other chattels (*a*). 7. *Fixtures*, or things fixed to the freehold, may not be distrained; as caldrons, windows, doors, and chimney-pieces; for they savour of the realty (*b*). For this reason also growing corn could not be distrained, till the statute 11 Geo. II. c. 19, empowered landlords to distrain any corn or other products of the earth while still growing, and to cut and gather them when ripe (*c*). Besides the pre-

3, c. 50, s. 6. On the other hand, the goods of a tenant cannot be taken in execution (or by his trustee in bankruptcy or liquidation) if his landlord puts in a claim for rent in arrear, unless such arrears. to the extent of one year's rent (8 Ann. c. 18), be first paid; or (if the tenancy be for a term less than a year), to the extent of the arrears of rent accruing during four such terms (see 7 & 8 Vict. c. 96, s. 67; 32 & 33 Vict. c. 71, s. 34). And by 14 & 15 Vict. c. 25, s. 2, if the growing crops of a tenant be seized and sold in execution, such crops, so long as they remain on the lands, shall, in default of other sufficient distress, be liable to be distrained upon for rent becoming due after the seizure and sale. See also 19 & 20 Vict. c. 108, s. 75, as to the landlord's right to claim rent as against an execution under the warrant of a *county court*,—a case to which the provision of 8 Ann. c. 14, is inapplicable.

(*y*) 1 Roll. Ab. 667; Vin. Abr. Dist. (H); Wilson *v.* Ducket, 2 Mod. 61.

(*z*) Darby *v.* Harris, 1 Q. B. 895; Morley *v.* Pincombe, 2 Exch. 101.

(*a*) Johnson *v.* Faulkner, 2 Q. B. 925.

(*b*) See Niblett *v.* Smith, 4 T. R. 504; Dalton *v.* Whittem, 3 Q. B. 961.

(*c*) See Miller *v.* Green, 8 Bing. 92. Trees or shrubs in a nursery-ground are not within this statute. (Clark *v.* Gaskarth, 8 Taunt. 431.)

ceding articles which are *absolutely* privileged, there are others which are privileged *sub modo*,—as, 8thly, beasts of the plough (*averia carucæ*) and sheep, and instruments of husbandry; and 9thly, the instruments of a man's trade or profession; as the axe of a carpenter, the books of a scholar, and the like (*d*).] And as to all of these the rule is, that they are exempt from distress, provided there be other sufficient distress on the premises, but not otherwise (*e*).

Thirdly. Let us next consider how distresses may be taken, disposed of, or avoided. And in the course of the inquiry we shall find, that under this head, viz. in what relates to the manner of disposing of distresses, a very important innovation has been made by modern statutes upon the antient law. [For formerly (as we have remarked) distresses were looked upon in no other light, generally speaking, than as a mere pledge, or security for payment of rent or other duties, or satisfaction for damage done. And so the law still continues with regard to distresses of beasts taken *damage feasant*, and for some other causes: over which the distrainor has no other power than to retain them till satisfaction is made. But distresses for *rent* being found by the legislature to be the shortest and most effectual method of compelling the payment thereof, many beneficial enactments have, from time to time, been made for rendering the remedy in this case more perfect, and for allowing the thing taken to be *sold*.

In pointing out the methods of distraining, we shall in

(*d*) See the case of Nargett *v.* Nias, 1 E. & E. 439.

(*e*) See Co. Litt. 47 a; 2 Inst. 132; Gorton *v.* Faulkner, 4 T. R. 565; Hutchins *v.* Chambers, 1 Burr. 589; Piggott *v.* Birtles, 1 Mee. & W. 441; Keen *v.* Priest, 4 H. & N. 236. It may be noticed here, that by "The Railway Rolling Stock Protection Act, 1872," (35 & 36 Vict. c. 50,) wagons, trucks, carriages of all kinds, and locomotive engines used on railways while at work on any colliery, quarry, mine, manufactory, warehouse, wharf, pier or jetty in or on which there is any railway siding,—if bearing a proper metal plate or mark indicating the actual owner thereof,—are prohibited from being distrained for rent payable by the tenant of such colliery or other work.

[general suppose the distress to be made for rent; and remark, where necessary, the difference between such distress and one taken for other causes.

In the first place, then, all distresses must be made *by day*, unless in the case of *damage feasant* (*f*); an exception being there allowed, lest the beasts should escape before they are taken (*g*). And, when a landlord intends to make a distress, he must, by himself or his bailiff, make entry on the demised premises; and this formerly must have been during the continuance of the lease, but now, (by 9 Ann. c. 14,) if the tenant holds over, the landlord may distrain within six months after the determination of the lease; provided his own title or interest, as well as the tenant's possession, continue at the time of the distress (*h*).] If the lessor does not find sufficient distress on the premises, he could, as the law once stood, resort nowhere else; and therefore tenants, who were knavish, made a practice to convey away their goods and stock fraudulently from the house or lands demised, in order to cheat their landlords. And, as the general rule, the distress must still be on the premises demised (*i*). But by 9 Ann. c. 14, and 11 Geo. II. c. 19, the landlord may now distrain any goods of his tenant, carried off the premises fraudulently or clandestinely, wherever he finds them, within thirty days after the removal, unless they have been meanwhile *bonâ fide* sold for a valuable consideration: and all persons privy to, or assisting in, such fraudulent conveyance, shall forfeit double their value to the landlord (*k*). The landlord may also distrain, for rent service, the beasts of his tenant feeding upon any commons or wastes appendant or appurtenant to the demised premises (*l*). It is to be noticed, that the land-

(*f*) 7 Rep. 7 a.

(*g*) Co. Litt. 142.

(*h*) As to what is a continuing possession, Taylerson *v.* Peters, 7 A. & E. 110.

(*i*) Buszard *v.* Capel, 8 Barn. & Cress. 141.

(*k*) See Angell *v.* Harrison, 17 L. J. (Q. B.) 25; Dibble *v.* Bowater, 2 Ell. & Bl. 564.

(*l*) 11 Geo. 2, c. 19, s. 8. See Miller *v.* Green, 8 Bing. 92.

lord in order to distrain may not break open his tenant's house; for that is a breach of the peace (*m*). But when he is once in the house, he may break open an inner door; and if goods have been fraudulently removed from the premises and locked up to prevent a distress, he may, by the assistance of a peace officer, break open in the day time any place whither they have been so removed;—oath being first made to a justice, in case it be a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein (*n*).

[Where a man is entitled to distrain for an entire duty, he ought to distrain for the whole at once; and not for part at one time and part at another (*o*). But if he distrain for the whole, and there be not sufficient on the premises, or if he happen to mistake the value of the thing distrained, and so take an insufficient distress, he may take a second distress to complete his remedy (*p*).

Distresses must be proportioned to the rent in arrear; and by the statute of Marlbridge, (52 Hen. III. c. 4,) if any man take a great or unreasonable distress, he shall be heavily amerced for the same. Thus if the landlord distrain two oxen for twelve pence rent, the taking of *both* is an unreasonable distress; but, if there were no other distress nearer the value to be found, he might reasonably have distrained *one* of them (*q*). And for homage or fealty, or suit and service, it is said that no distress can be excessive (*r*); for as these distresses cannot be sold, the owner, upon making satisfaction, may have his chattels again (*s*). The remedy for excessive

(*m*) Co. Litt. 161; Comberb. 17; Brown *v.* Glenn, 16 Q. B. 254; Ryan *v.* Shiloch, 7 Exch. 72; Eldridge *v.* Stacey, 15 C. B. (N. S.) 458; Attack *v.* Bramwell, 3 B. & Smith, 520; Nash *v.* Lucas, Law Rep., 2 Q. B. 590.

(*n*) 11 Geo. 2, c. 18.

(*o*) 2 Lutw. 1532; see Dawson *v.* Cropp, 1 C. B. 981; Lee *v.* Cooke, 3 H. & N. 205.

(*p*) Cro. Eliz. 13; stat. 17 Car. 2, c. 7; Hutchins *v.* Chambers, 1 Burr, 590.

(*q*) 2 Inst. 107.

(*r*) Bro. Abr. tit. Assize, 291, Prerogative, 98.

(*s*) Such a distress (remarks

[distress is by a special action on the statute of Marlbridge; for an ordinary action for the trespass is not maintainable upon this account, it being no injury at the common law (*t*).

When the distress is thus taken, the next consideration is the disposal of it. For which purpose the things distrained must in the first place be impounded by the taker. But, in their way to the pound, they may be *rescued* by the owner, in case the things were taken without cause, or contrary to law; as if no rent be due; if they were taken upon the highway, or the like; in these cases the tenant may lawfully make rescue (*u*). But if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out; for they are then in the custody of the law (*x*).] Accordingly by 2 W. & M. sess. 1, c. 5, an action on the case for treble damages will lie for illegally taking a distress for rent out of pound. And in case of distress *damage feasant*, it is enacted by 6 & 7 Vict. c. 30, that if any person shall release or attempt to release cattle lawfully seized by way of such distress, from the place where they shall be impounded, or on the way to or from such place, or shall destroy the pound, or any part, lock or bolt thereof,—he shall, on conviction before two justices of the peace, be liable to a penalty not exceeding 5*l.*, and to payment of the reasonable charges and expenses; and in default may be committed to the house of correction, with hard labour, for not more than three calendar months nor less than fourteen days (*y*).

Blackstone, vol. iii. p. 231) may be repeated from time to time till the stubbornness of the party is conquered, and is called a *distress infinite*.

(*t*) See 1 Ventr. 104; Fitzgib. 85; Fisher *v.* Algar, 2 C. & P. 374; Hutchins *v.* Chambers, 1 Burr. 590; Roden *v.* Eyton, 4 C. B. 427; Tancred *v.* Leyland, 16 Q. B. 669; Glynn *v.* Thomas, 11 Exch. 870.

(*u*) Co. Litt. 160, 161.

(*x*) Co. Litt. 47. It has been doubted whether rescue of goods distrained, or pound breach (if without breach of the peace), are indictable offences: but it seems that they are. (1 Russ. on Crimes, 411.)

(*y*) But the justices cannot hear

[A *pound* (*parcus*, which signifies any inclosure,) is either pound *overt*, that is, open overhead; or pound *covert*, that is, close. By the statute 1 & 2 P. & M. c. 12, no distress of cattle can be driven out of the hundred where it is taken, unless to a pound overt within the same shire; and within three miles of the place where it was taken. This is for the benefit of the tenants, that they may know where to find and replevy the distress. And by statute 11 Geo. II. c. 19, which was made for the benefit of landlords, any person distraining for rent may turn any part of the premises, upon which a distress is taken, into a pound, *pro hâc vice*, for securing of such distress (*z*).] If animals be impounded, the onus of their support is thrown, by the legislature, upon the distrainor. For, by 12 & 13 Vict. c. 92, ss. 5, 6, he is bound to supply them with sufficient food and water, upon penalty of twenty shillings for every refusal or neglect, to be adjudged by a justice in a summary way (*a*). [A distress of household goods, or other dead chattels, which are liable to be stolen, or damaged by weather, ought to be impounded in a pound covert, else the distrainor must answer for the consequences (*b*).

When impounded, the goods were formerly, as has been before observed, only in the nature of a pledge or security to compel the performance of satisfaction; and upon this account it hath been held that the distrainor is not at liberty to work or use a distrained beast (*c*). And thus

any case in which a question of title to land arises, or any question as to a bankruptcy or execution, or the obligation to repair walls, &c. (6 & 7 Vict. c. 30, s. 2.)

(*z*) See Washborn *v.* Black, 11 East, 504, n. (*a*); Pitt *v.* Shew, 4 B. & Ald. 208; Swann *v.* Earl Falmouth, 8 Barn. & Cress. 456; Woods *v.* Durrant, 16 Mee. & W. 149; Tennant *v.* Field, 8 Ell. & Bl. 336; Johnson *v.* Upham, 2 Ell. & Ell. 250.

(*a*) This statute repeals 5 & 6 Will. 4, c. 59.

(*b*) See Mason *v.* Newland, 9 C. & P. 575; Wilder *v.* Speer, 8 A. & E. 547; Bignell *v.* Clarke, 5 H. & N. 485.

(*c*) See Smith *v.* Wright, 6 H. & N. 821. Unless, indeed (as in the case of milking kine), it be for the benefit of the owner. (Bagshawe *v.* Goward, Cro. Jac. 148.) The law is

[the law still continues with regard to beasts taken damage feasant, and distresses for suit or services; for these must remain impounded till the owner makes satisfaction; or until he contests the right of distraining, by replevying the chattels, a proceeding of which we shall presently say more.

The distress therefore in these cases, though it puts the owner to inconvenience, and is consequently a punishment to him, yet if he continues obstinate, and will make no satisfaction or payment, is no remedy at all to the distrainor. But for a debt due to the crown, unless paid within forty days, the distress was always saleable even at the common law (*d*). And now, it has been expressly provided, in like manner, by several acts of parliament (*e*), that in all cases of distress for rent, if the owner do not, within *five days* after the distress is taken, and notice of the cause thereof given him, replevy the same with sufficient security, the distress may be appraised by two sworn appraisers, and sold towards satisfaction of the rent and charges (*f*); the overplus, if any, being rendered to the owner himself (*g*). By such means therefore a full and entire satisfaction may now be had for rent in arrear, by the mere act of the party himself, viz., by distress, the remedy given at common law,—and sale consequent thereon, which is added by act of parliament.

As for the proceeding called a replevin, to which we just had occasion to refer, it will be sufficient for the present to state, that to replevy, (*replegiare*, to take back

the same in the case of *estrays*. Vide sup. vol. II. p. 548.

(*d*) Bro. Abr. tit. Distress, 71.

(*e*) 2 W. & M. sess. 1, c. 5; 8 Ann. c. 14; 4 Geo. 2, c. 28; 11 Geo. 2, c. 19. As to distresses for small rents, 57 Geo. 3, c. 93.

(*f*) See Wilson *v.* Nightingale, 8 Q. B. 1054; Lucas *v.* Tarleton, 3 H. & N. 116.

(*g*) See Jacob *v.* King, 5 Taunt. 451; Lyons *v.* Tomkies, 1 Mee. & W. 693; Knight *v.* Egerton, 7 Exch. 407; Evans *v.* Wright, 2 H. & N. 527. By 57 Geo. 3, c. 93, s. 6, every broker who makes a distress, in any case whatsoever, is to give a copy of his charges, &c. (See Hart *v.* Leach, 1 Mee. & W. 560.)

[the pledge), is when a person who has been distrained upon for rent, for damage feasant, or for suit and service, applies to the proper authority to interpose (*h*): and thereupon has the distress returned into his own possession, upon giving good security to try the right of taking it, in a particular action (called the action of replevin), wherein the owner of the goods is the plaintiff and the distrainor the defendant; and engaging, in the event of being unsuccessful, to return the distress into the hands of the distrainor.

Before we quit this subject, it should be observed, that the many particulars which attend the taking of a distress, used formerly to make it a hazardous kind of proceeding: for if any one irregularity was committed, it vitiated the whole, and made the distrainor a trespasser *ab initio* (*i*). But now, by the statute 11 Geo. II. c. 19, s. 19, it is provided, that where any distress shall be made for any kind of *rent* justly due, and any subsequent unlawful act or irregularity shall be committed by the party distraining, the distress itself shall not therefore be deemed unlawful, or the parties making it trespassers *ab initio* (*k*); but the party grieved shall only have an action for the real damage sustained, and not even that, if tender of amends is made before any action is brought (*l*).

VI. The seizing of heriots, when due on the death of a tenant, is another species of self-remedy; not much un-

(*h*) This application used to be made to the sheriff; it is now made to the registrar of the county court for the district (19 & 20 Vict. c. 108, ss. 63, 64). This enactment applies to all cases of replevin, 23 & 24 Vict. c. 126, s. 22.

(*i*) 1 Ventr. 37. As to the circumstances under which distrainors can be considered as trespassers, *ab initio*, see the Six Carpenters' case, 8 Co. Rep. 1466; Evans *v.* Elliott, 5 Ad. & E. 142; West *v.* Nibbs, 4 C. B. 172; Attack *v.* Bramwell, 3 B. & Smith, 520.

(*k*) See Gambrell *v.* Earl of Falmouth, 5 Ad. & El. 403.

(*l*) See Harvey *v.* Pocock, 11 Mee. & W. 740; Rodgers *v.* Parker, 18 C. P. 112.

[like that of taking cattle or goods in distress (*n*). As for that division of heriots which is called heriot-service, and is only a species of rent, the lord may distrain for this, as well as seize; but for heriot-custom, (which Sir Edward Coke says lies only in *prender*, and not in *render*,) the lord may seize the identical thing itself, but cannot distrain any other chattel for it (*o*). The like speedy and effectual remedy, by seizure, is given with regard to many things that are said to lie in franchise; as waifs, wrecks, estrays, and the like; all of which the persons entitled thereto may seize, without the aid of a court. Not that they are debarred of their remedy by action; but they have also the other, and more speedy one, for the better asserting their property; the thing to be claimed being frequently of such a nature as might be out of the reach of the law before any action could be brought.

These are the several species of remedies which may be had by the mere act of the party injured. We shall next briefly mention such as arise from the joint act of all the parties together. And these are only two,—*accord and satisfaction* and *arbitration*.

I. *Accord* is an agreement to make satisfaction entered into between the party injuring and the party injured, which, when performed, is a bar of all actions upon this account. As if a man contract to build a house or deliver a horse, and fail in it; this is an injury, for which the sufferer may have his remedy by action: but if the party injured accepts a sum of money, or other thing, as a satisfaction, this is a redress of that injury, and entirely takes away the action (*p*).] But it is to be observed under this head, first, that the action will not be taken away by mere accord without actual satisfaction. For example, in

(*n*) As to heriots, vide sup. vol. I. p. 629.

(*o*) See Co. Cop. s. 25; Odiham *v.* Smith, Cro. El. 590; Major *v.* Brandwood, Cro. Car. 260.

(*p*) 9 Rep. 79.

the case supposed, the mere agreement to accept the sum of money will not, until actual payment of the amount, bar the action on the original agreement to build the house or deliver the horse;—for this would only be substituting one right of action for another. Secondly, that the taking a smaller sum of money in lieu of a greater sum of fixed or certain amount, does not answer to the legal idea of satisfaction. Thus, if a man owe 100*l.*, an agreement between him and his creditor that he shall pay 50*l.* in satisfaction, will not, though the latter sum be actually paid, suffice in law to bar the action on the original debt. But if any thing except money be taken in lieu of a fixed sum of money, the action for the latter will be barred, however much its amount may exceed the value of the thing so accepted (*q*).

II. [*Arbitration* is where the parties, injuring and injured, submit all matters in dispute, concerning any personal chattels or personal wrong (*r*), to the judgment

(*q*) See Pinnel's case, 5 Rep. 117a; Wright *v.* Acres, 6 A. & E. 726; Bayley *v.* Homan, 3 B. N. C. 920; Curlewis *v.* Clark, 3 Exch. 375. In an action by several plaintiffs for a joint demand, the defendant may plead an accord and satisfaction with *one*. (Wallace *v.* Kelsall, 7 M. & W. 264.) As to an accord by a *stranger*, see Thurman *v.* Wild, 11 A. & E. 453; Jones *v.* Broadhurst, 9 C. B. 173.

(*r*) This method of decision has been also authorized by statute, in a variety of cases; as, in questions as to *tithes and commons* (6 & 7 Will. 4, c. 71; 8 & 9 Vict. c. 118); as to compensation for lands taken for *undertakings of a public nature* (8 & 9 Vict. c. 16), for *railways* (8 & 9 Vict. c. 20), for *markets and fairs* (10 & 11 Vict. c. 14), for *water works* (c. 17), for *harbours, docks and piers* (c. 27), for *improvements in towns* (c. 34), for *land drainage* (c. 38, and 24 & 25 Vict. c. 133), or for *cemeteries* (c. 65). And even some criminal matters—not amounting to felony—may be thus disposed of; for example, an indictment for an *ordinary assault* (Elworthy *v.* Reid, 2 Sim. & Stu. 372), or for *a nuisance* (Dobson *v.* Groves, 6 Q. B. 637); but, in such cases, it is essential that the prosecutor should also have had a remedy by action. (The Queen *v.* Hardey, 14 Q. B. 529; The Queen *v.* Blakemore, ibid. 541.) See also the provisions of 12 & 13 Vict. c. 45, s. 12—15, allowing a reference to arbitration, in certain cases where the remedy would otherwise be only by appeal to the general or quarter

[of two or more *arbitrators*, who are to decide the controversy; and if they do not agree, it is usual to add, that another person be called in as *umpire—imperator* or *impar* (*s*),—to whose sole judgment it is then referred: or frequently there is only one arbitrator originally appointed (*t*). This decision, in any of these cases, must be in writing, and is called an *award*. And thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties or the judgment of a court of justice (*u*). But the right of real property cannot thus pass by a mere award (*x*); which subtilty, in point of form (for it is now reduced to nothing else), had its rise from feodal principles; for, if this had been permitted, the land might have been aliened collusively without the consent of the superior. Yet doubtless an arbitrator may now award a conveyance or a release of land; and it will be a breach of the arbitration bond to refuse compliance (*y*).] Originally the submission to arbitration used to be, and may still be, by word or by deed, yet both of these being revocable in their nature, it became the practice to enter into mutual bonds, with condition to stand to the award or arbitration of the arbitrators or umpire therein named, or, in default thereof, to pay a certain penalty. And experience having shown the great use of these peaceable and domestic tribunals, especially in settling matters of account and other mercantile transactions, which are diffi-

sessions of the peace. And see 22 & 23 Vict. c. 59, enabling railway and canal companies to settle their differences with other companies by arbitration; and 36 & 37 Vict. c. 48, ss. 8, 9, authorizing the railway commissioners appointed by that Act themselves to decide such differences instead of referring them to arbitration.

(*s*) Whart. Angl. Sacr. i. 772; Nichols. Scot. Hist. Libr. c. i. *prope finem.*

(*t*) As to the appointment of arbitrators and of umpire, some new provisions will be found in 17 & 18 Vict. c. 125, ss. 12—14.

(*u*) Brownl. 55; 1 Freem. 410.

(*x*) 1 Roll. Abr. 242; Marks *v.* Marriott, 1 Ld. Raym. 115.

(*y*) Doe *v.* Rosser, 8 East, 15. And see 17 & 18 Vict. c. 125, s. 16, post, p. 261, n. (*a*).

cult and almost impossible to be adjusted in court, the legislature has now established the use of them, as well in controversies where causes are depending, as in those where no action is brought,—enacting by statute 9 & 10 Will. III. c. 15, that all who desire to end any controversy, suit, or quarrel may agree in writing that their submission to arbitration or umpirage shall be made a rule of any of the courts of record: which agreement being proved upon oath by one of the witnesses thereto, the court shall make a rule that such submission and award shall be conclusive (*z*). And, after such rule, the parties disobeying the award shall be liable to be punished as for a contempt of the court; unless such award shall be set aside for corruption, or undue means used in its procurement, or other misbehaviour in the arbitrators or umpire, proved on oath to the court, within one term after the award is made. And in consequence of this statute, it is now become a considerable part of the business of the superior courts to set aside such awards, when partially or illegally made; or to enforce their execution, when legal, by the same process of contempt as is awarded for disobedience of those rules and orders which are issued by the courts in other cases (*a*).

The law on this subject has also been much improved by more recent enactments; for it was provided by 3 & 4 Will. IV. c. 42, that the power of any arbitrator or umpire

(*z*) By 17 & 18 Vict. c. 125 (The Common Law Procedure Act, 1854), s. 17, every agreement or submission to arbitration by consent—whether by deed or by instrument not under seal—may be made a rule of court *unless* an intention of the parties to the contrary appear thereby.

(*a*) As to the course of proceeding by attachment, to enforce an award, see Queen *v.* Hemsworth, 8 C. B. 745. It may be remarked here, that besides the proceeding by way of attachment, as for a contempt, an *action* may be brought on the award; and that where the award directs possession of land to be delivered to any party, or that any such party is entitled to the possession of such land, the court may order possession to be delivered to him accordingly, which shall have the effect of a judgment in ejectment. (17 & 18 Vict. c. 125, s. 16.)

appointed in pursuance of a submission containing such agreement as aforesaid to make the arbitration a rule of court—or appointed by any rule of court, or judge's order, or order of nisi prius, in any action—should not be revocable by either party without leave of the court; and that the court or a judge might command the attendance of witnesses before the arbitrator, whose failure to attend should be deemed a contempt of court; and, that, if in any such submission, rule or order of reference, it should be agreed or ordered that the witnesses are to be examined on oath, the arbitrator must administer such oath accordingly; and any such witness giving false evidence is guilty of perjury (*b*).

As to the effect of an award, when made, and not set aside by the court for invalidity, it is in general conclusive and final; and upon an action or other proceeding brought to enforce it, no objection to its validity can be made, unless in respect of such defect as may happen to be apparent *on the face of the award itself:* the rule being that all *extrinsic* objections must be taken in the shape of a substantive application to the court to set the award aside on that ground (*c*); and any such application must be made before the last day of the term next after the award is made and published (*d*).

(*b*) Certain matters arising in the course of an action may also be referred to arbitration, not at the option of the parties but by the compulsory order of the court. The redress afforded hereby is not consequently obtained by the *act of the parties*, and does not fall within the subject-matter of the present chapter.

(*c*) See Braddick *v.* Thompson, 8 East, 344; Paull *v.* Paull, 2 Dowl. 340; Grazebrook *v.* Davis, 5 B. & C. 534; Macarthur *v.* Campbell, 2 Ad. & El. 52.

(*d*) 9 & 10 Will. 3, c. 15, s. 2. See Young *v.* Timmins, 1 Tyrw. 230, n.

CHAPTER II.

OF REDRESS BY THE MERE OPERATION OF LAW.

[THE remedies for private wrongs, which are effected by the mere operation of the law, will fall within a very narrow compass, there being, it is believed, only two instances of this sort capable of being suggested; the one, that of *retainer*, where a creditor is made executor or administrator to his debtor; the other, in the case of what the law calls *remitter*.

I. As to *retainer*. The law relating to executors and administrators has been already discussed in a former part of the work (*a*), where, amongst other matters, it was mentioned that if a person indebted to another, makes his creditor his executor, or if such creditor obtains letters of administration to his debtor, in these cases the law gives him a remedy for his debt, by allowing him to *retain* so much as will pay himself, before any other creditors whose debts are of equal degree (*b*). This is a remedy by the mere act of law, and grounded upon this reason,—that the executor cannot, without an apparent absurdity, commence an action against himself, as representative of the deceased, to recover that which is due to him in his own private capacity; but, having the whole personal estate in his hands, so much as is sufficient to answer his own demand is, by operation of law, applied to that particular

(*a*) Vide sup. vol. II. p. 203.

(*b*) See 1 Roll. Abr. 922; Plowd. 543; Glaholm *v.* Rowntree, 9 A. & E. 710.

[purpose. Else, by being made executor, he would be put in a worse condition than all the rest of the world besides; as every other creditor but himself is in a condition to commence an action, and obtain judgment for recovery of his debt. But, as the law stands, the effect of this right of retainer is to put him in some measure in a *better* position than other creditors; because it enables him to obtain payment *first*, (among all those of equal degree,) and before any other has had time to commence an action. And this seems to illustrate a remark of Lord Bacon, that the benignity of the law is such, as when, to preserve the principles and grounds of law, it depriveth a man of his remedy without his own fault, it will rather put him in a better degree and condition than in a worse (*c*). However the executor shall not retain his own debt in prejudice to those of a higher degree; for the law only puts him in the same situation as if he had sued himself as executor, and recovered his debt; which he never could be supposed to have done, while debts of a higher nature subsisted. Neither shall one executor be allowed to retain his own debt, in prejudice to that of his co-executor in equal degree; but both shall be discharged in proportion (*d*). Nor shall an executor of his own wrong be in any case permitted to retain (*e*).]

II. *Remitter* is where he who hath the right of entry in lands, but is out of possession, obtains afterwards the possession of the lands by some subsequent, and of course defective, title; in which case he is remitted, or sent back, by operation of law, to his antient and more certain title (*f*). The possession which he hath gained by a bad

(*c*) Bac. Elem. c. 9.

(*d*) Vin. Abr. tit. Executors, D. 2.

(*e*) 5 Rep. 30.

(*f*) Litt. ss. 659, 693, 695; Co. Litt. 363 b; Gilb. Ten. 129. As to the effect of the Statute of Uses in modifying the doctrine of *remitter*,

title, shall be *ipso facto* annexed to his own inherent good one; and his defeasible estate shall be utterly defeated and annulled by the instantaneous act of law, without his participation or consent(*g*). Thus, if A. disseises B., that is, wrongfully turns him out of possession of the freehold, and afterwards demises the land to B. (without deed) as tenant from year to year, under which demise B. entereth; this entry is a remitter to B., who is in of his former and surer estate(*h*). But if A. had demised to him for years by deed, or by matter of record, there B. would not have been remitted. For if a man by deed takes a lease of his own lands, it shall bind him to the rent and covenants; because a man can never be allowed to affirm that his own deed is ineffectual, since that is the greatest security on which men rely in all manner of contracting. The same law, if it had been by matter of record; for that is of its own nature uncontrollable evidence, which a man cannot be allowed to controvert(*i*).

The reason given by Littleton, why this remedy, which operates silently and by the mere act of law, was allowed, is somewhat similar to that given in the preceding article; because otherwise he who hath right would be deprived of all remedy(*k*). For as he himself is in possession of the land, there is no other person upon whom he can make entry(*l*).

see 1 Saund. Uses, 166. As to remitter generally, Doe *v.* Woodroffe, 10 Mee. & W. 608.

(*g*) Co. Litt. 358; Wood *v.* Sir J. Shurley, Cro. Jac. 409.

(*h*) Litt. s. 695; Gilb. Ten. 129.

(*i*) Gilb. Ten. ubi sup.

(*k*) Litt. s. 661; Litt. by Butl. 347 b, n.(1).

(*l*) Blackstone (vol. iii. p. 19) treats of *remitter* as if it had no application except to the case where the disseisee was out of possession under such circumstances that he could only recover possession by *real action*. But it was also applicable (as it still is) to the case stated in the text, of his being out of possession, with right of recovering possession *by entry*. (Litt. s. 693; Gilb. Ten. ubi sup.; Co. Litt. by Butl. ubi sup.) And now, in consequence of the change of the law, by which real actions in general are

And thus much for these extrajudicial remedies, which are furnished or permitted by the law, where the parties injured are so peculiarly circumstanced as not to make it possible to apply for redress in the usual and ordinary methods.

abolished (a subject to which we shall have occasion to refer more particularly hereafter), the former case can no longer arise, and it is *only* in the latter that any example of *remitter* can occur.

CHAPTER III.

OF THE COURTS IN GENERAL.

[THE next object of our inquiries is the redress of injuries by the courts of justice: wherein the act of the parties and the act of law co-operate; the act of the parties being necessary to set the law in motion, and the process of the law being in general the only instrument by which the parties are enabled to procure a certain and adequate redress.

And here it will not be improper to observe, that although in the several cases of redress by the act of the parties mentioned in a former chapter, the law allows an extrajudicial remedy, yet that does not exclude the ordinary courts of justice(*a*): but it is only an additional weapon put into the hands of certain persons in particular instances, where the peculiar circumstances of their situation require a more expeditious remedy, than the formal process of any court of judicature can furnish. Therefore, though I may defend myself, or my relations, from external violence, I yet am afterwards entitled to an action of assault and battery: though I may retake my goods if I have a fair and peaceable opportunity, this power of recaption does not debar me from my action of trover or detinue: I may either enter on the lands on which I have a right of entry, or may demand possession by an action of ejectment: I may either abate a nuisance by my own authority, or call upon the law to do it for me: I may distrain for rent, or have an action for the debt, at my own option: if I do not distrain my neighbour's

(*a*) Vide sup. p. 239.

[cattle *damage feasant*, I may compel him by action of trespass to make me a fair satisfaction: if a heriot be withheld from me by fraud or force, I may recover it though I never seized it. And with regard to accords and arbitrations, these, in their nature being merely an agreement or compromise, must indisputably suppose a previous right of obtaining redress some other way; which is given up by such agreement. But as to remedies by the mere operation of law, those are indeed given, because no remedy can be administered by action, without running into the absurdity of a man's bringing an action against himself.

In treating of the remedies afforded by courts, we shall begin with some remarks on the nature of the courts themselves, and on their incidents in general; and then proceed to consider the several species of them, which have been erected and acknowledged by the laws of England.

A court is defined to be a place wherein justice is judicially administered (*b*). And, as by our excellent constitution the sole executive power of the laws is vested in the person of the sovereign, it will follow that all courts of justice, (which are the medium by which he administers the laws,) are derived from the power of the crown (*c*). For, whether created by Act of parliament, or letters-patent, or subsisting by prescription,—the only three methods by which any court of judicature can exist,—the king's consent in the two former is expressly, and in the latter impliedly, given (*d*). In all these courts the sovereign is supposed, in contemplation of law, to be always present: but as that is in fact impossible, he is there represented by his judges, whose power is only an emanation of the royal prerogative.

For the more speedy, universal, and impartial administration of justice between subject and subject, the law hath appointed a variety of courts, some with a more limited,

(*b*) Co. Litt. 58.
(*c*) Vide sup. vol. II p. 504.
(*d*) Co. Litt. 260.

[others with a more extensive jurisdiction; some constituted to inquire only, others to hear and determine; some to determine in the first instance, others upon appeal and by way of review.]

Some of these courts are *inferior* and others *superior;* some have a jurisdiction at *common law* and some *in equity;* others have an *ecclesiastical* or *maritime* jurisdiction only; and in others again (of modern establishment) these various jurisdictions are combined. And of all of them in turn notice will be taken in their respective places: but we may here mention one distinction that runs through them all; viz., that some of them are courts *of record,* others *not of record.* [A court of record is one whereof the acts and judicial proceedings are enrolled for a perpetual memorial and testimony: which rolls are called the records of the court, and are of such high and supereminent authority, that their truth is not to be called in question (*e*). For it is a settled rule and maxim, that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary (*f*). And if the existence of a record be denied, it shall be tried by nothing but itself; that is, upon bare inspection whether there be any such record or no; else there would be no end of disputes. But if there appear any mistake of the clerk in making up such record, the court will direct him to amend it. All courts of record are the courts of the sovereign, in right of the crown and royal dignity (*g*);] and therefore every court of record has authority to fine and imprison for contempt of its authority (*h*): while on

(*e*) As to records, vide sup. vol. I. p. 47.

(*f*) Co. Litt. 260; sup. vol. I. p. 482, n. (*d*).

(*g*) Finch, L. 231.

(*h*) 8 Rep. 38 b; Hawk. b. 2, c. 22, s. 1; Bac. Abr. Courts, E.; R. *v.* Clement, 4 B. & Ald. 233; R. *v.* Davidson, 5 B. & Ald. 337; R. *v.* James, ibid. 894. As to contempt of court generally, see Miller *v.* Knox, 4 Bing. N. C. 574; Doe *d.* Cardigan *v.* Bywater, 7 C. B. 794. The nature of the several courts of justice, and the extent of their power to fine and imprison for contempt, are also carefully examined in Ex parte Fernandez, 10 C. B.

the other hand the very erection of a new jurisdiction, with power of fine or imprisonment, makes it instantly a court of record (*i*). But the common law courts *not* of record are of inferior dignity, and in a less proper sense the king's courts—and these are not, as the general rule, intrusted by the law with any power to fine or imprison the subjects of the realm (*j*). And in these, the proceedings not being enrolled or recorded, as well their existence, as the truth of the matters therein contained, shall, if disputed, be tried and determined by a jury (*k*).

[In every court there must be at least three constituent parts, the *actor*, *reus*, and *judex;* the *actor*, or plaintiff, who complains of an injury done: the *reus*, or defendant, who is called upon to make satisfaction for it; and the *judex*, or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and, if any injury appears to have been done, to ascertain, and by its officers to apply, the remedy. It is also usual, in the higher courts, to have attornies (or solicitors) and counsel, as assistants.]

Of these we have already found occasion, in other parts of this work, to make some mention (*l*). But in reference more particularly to their connection with courts of justice, it is to be understood that an attorney (or solicitor) answers to the *procurator*, or proctor, of the civilians and canonists (*m*)—being one who is put in the place, stead, or *turn* of another, to manage his proceedings in a

(N. S.) 1. As to a *county* court, in particular, see 9 & 10 Vict. c. 95, s. 113; 12 & 13 Vict. c. 101, s. 2; Levy *v.* Moylan, 10 C. B. 189; Ex parte Joliffe, In re Lefroy, Law Times, 8th Feb. 1873, p. 269.

(*i*) See Groenvelt *v.* Burwell, Salk. 200; Grenville *v.* College of Physicians, 12 Mod. 388.

(*j*) Dyson *v.* Wood, 3 Barn. & Cress. 449.

(*k*) 2 Inst. 311; 8 Rep. 38 b; 11 Rep. 43 b; 3 Bl. Com. 24.

(*l*) As to attornies, vide sup. p. 214; as to counsel, sup. vol. I. p. 17.

(*m*) As to the admission required before a person can act as an attorney, solicitor or *proctor* in any court, and as to the annual certificate he is required to take out, see 33 & 34 Vict. c. 97.

cause (*n*). [Formerly every suitor was obliged to appear in person, to prosecute or defend his suit, unless by special licence under the king's letters patent. But, as in the Roman law, "*cum olim in usu fuisset, alterius nomine agi non posse, sed quia hoc non minimam incommoditatem habebat, cœperunt homines per procuratores litigare*" (*o*), so with us, upon the same principle of convenience, it is now permitted in general, that attornies may prosecute or defend in the absence of the parties to the action (*p*); though it is said that an infant or a married woman cannot to this day, in point of *form*, appear in court by attorney; but, even when an attorney is actually employed for them, should be described in the proceedings as appearing in person or by guardian, according to the nature of the case (*q*). These attornies (or solicitors) are now formed into a regular body; they are duly admitted—as elsewhere explained at large (*r*)—to the execution of their office (*s*); and are

(*n*) As to his responsibility in compromising a cause against the directions of his client, see Fray *v.* Voules, 1 E. & E. 839.

(*o*) Inst. Lib. 4, tit. 10.

(*p*) According to Blackstone this was first permitted by stat. Westm. 2, c. 10 (see 3 Bl. Com. 26). It was provided, however, by a previous statute (20 Hen. 3, c. 10), that every freeman might make attorney in suit to the court of the county, tithing, hundred, and wapentake, or the court of his lord. And even in the time of Henry the second, a party who had appeared in person, might afterwards appoint an attorney (*responsalis*) to represent him thenceforth in the cause. (Glan. lib. xi. c. 1.)

(*q*) Bro. Abr. t. Ideot, 4; Co. Lit. 135 b; 2 Saund. 212, n. (4); Beverley's case, 4 Rep. 124 b; Oulds *v.* Sansom, 5 Taunt. 261; F. N. B. 25. It forms one of the rules of procedure annexed to the Judicature Act, 1873, that, on the commencement of that Act in November, 1874, married women and infants may sue by their next friends, and infants defend by their guardians *ad litem;* and further, that married women (by leave of the court or a judge) may sue or defend without their husbands and without a next friend, on giving (if required) security for costs. (36 & 37 Vict. c. 66, sched. r. 15.)

(*r*) Vide sup. p. 215.

(*s*) So early as the statute 15 Edw. 2, regulations were made as to the admission of attornies; and by 4 Hen. 4, c. 18, it was enacted, that attornies should be examined by the judges, and none admitted but such as were virtuous, learned, and sworn to do their duty.

[in all points officers of the respective courts in which they are so admitted; and as they have many privileges on account of their attendance there, so they are peculiarly subject to the censure and animadversion of the judges thereof (*x*).]

Of counsel, called, among the civilians, *advocates*, there are (as mentioned in a former place) two species or degrees: barristers and serjeants. We have seen that the former are admitted after a considerable period of study in the Inns of Court (*y*); and in our old books they are styled apprentices, *apprenticii ad legem*, being there looked upon as merely learners, and not qualified to execute the full office of an advocate till they were of sixteen years' standing; at which time, according to Fortescue (*z*), they might be called to the state and degree of serjeants, or *servientes ad legem* (*a*). How antient and honourable this state and degree is, hath been so fully displayed by many learned writers, that it need not be here enlarged on (*b*).

(*x*) It may be noticed here, that all persons admitted as solicitors, attorneys, or proctors in any court, the jurisdiction of which is transferred by the Judicature Act, 1873, to the High Court of Justice or the Court of Appeal established by that Act, shall, after its commencement on the 2nd November, 1874, be called "Solicitors of the Supreme Court;" and the same title is to belong to all persons who shall thereafter be admitted to practise in either of the above courts. (36 & 37 Vict. c. 66, s. 87.)

(*y*) Vide sup. vol. I. p. 19.

(*z*) De LL. c. 50.

(*a*) A barrister, upon taking the degree of the *coif*, or becoming a serjeant, (a promotion conferred at the discretion of the lord chancellor, and for which no particular length of standing at the bar is now required,) retires from the inn of court by which he was called to the bar, and becomes a member of *Serjeants'* Inn. In former times the serjeants occupied three Inns: Scroop's Inn, or Serjeants' Place, opposite St. Andrew's Church, Holborn; Serjeants' Inn, Fleet Street; and Serjeants' Inn (once called Faryndon Inn), Chancery Lane; but only the last remains at the present day a law society. In the Hall of this Inn, during term, the judges and serjeants dine together; and there the judges sit as *visitors* of the inns of court.

(*b*) Fortesc. c. 50; 10 Rep. pref.; Dugdal. Orig. Jurid.; Case of the Serjeants, 6 Bing. N. C. 235. To which may be added a tract by Serjeant Wynne, printed in 1765, entitled "Observations touching "the Antiquity and Dignity of the

It is sufficient to observe, that serjeants at law are bound, by a solemn oath, to do their duty to their clients (*c*): and that it has hitherto been the custom that the judges of the courts of Westminster should be admitted into this venerable order before they are advanced to the bench (*d*). This custom, however, has been considered inconsistent with the tenor and object of the new system intended to be introduced by the Judicature Act, 1873, and it has accordingly been expressly abolished; it being enacted by 36 & 37 Vict. c. 66, s. 8, that no person appointed a judge either of the High Court of Justice or of the Court of Appeal by that Act established, shall be required to take or to have taken the degree of serjeant at law. From among the barristers and serjeants, some are usually selected, who (on the nomination of the lord chancellor) are made by letters patent his majesty's counsel learned in the law; the two principal of whom are called his attorney and solicitor-general. [The first king's counsel, under the degree of serjeant, was Sir Francis Bacon, who was so made *honoris causâ*, and without either patent or fee (*e*); so that the first of the modern order, (who are now the sworn servants of the crown,) seems to have been Sir Francis North, afterwards lord keeper of the great seal to King Charles the second (*f*). These counsel answer in some measure to the advocates of the revenue, *advocati fisci*, among the Romans. For they must not be employed in any cause against their sovereign, without special licence (*g*); in which restriction they agree with the advo-

" Degree of Serjeant at Law;" and " *Serviens ad Legem*," by Mr. Serjeant Manning. Et vide sup. vol. I. p. 17, n. (*k*).

(*c*) 2 Inst. 214.

(*d*) Fortesc. c. 50. The original of this was probably to qualify the puisné barons of the Exchequer to become justices of assize, according to the exigence of the statute, 14 Edw. 3, c. 16. (3 Bl. Com. p. 27.)

(*e*) See his Letters, 256.

(*f*) See his Life by Roger North, 37.

(*g*) Hence a queen's counsel cannot plead in court for the defendant in a criminal prosecution, without a licence from the crown to plead in that particular case. This permission is never refused, but at one time could be procured only at an expense of about 9*l*., which, however, is now reduced to about 2*l*. 2*s*.

[cates of the fisc (*h*): but in the imperial law the prohibition was carried still farther; for excepting in some peculiar causes, the fiscal advocates were not permitted to be at all concerned in private suits between subject and subject (*i*). A custom has in modern times prevailed of granting letters patent of precedence, to such barristers as the crown thinks proper to honour with that mark of distinction; whereby they are entitled to such rank and pre-audience as are assigned in their respective patents (*k*); which is sometimes next after the king's attorney-general, but usually next after his majesty's counsel then being (*l*).] These rank promiscuously with the king's counsel, and sit together with them and the serjeants *within* the bar of the respective courts, instead of sitting *without* it, as is the case with counsel in general (*m*): but they are not the sworn ser-

(*h*) Cod. 2, 2, 1.

(*i*) Cod. 2, 7, 13.

(*k*) Pre-audience in the courts is reckoned of so much consequence, that it may not be amiss to subjoin a short table of the precedence at the bar.

1. The attorney-general. By royal mandate, 14th December, 1814, the attorney and solicitor-general are to have place and audience before the premier serjeant. (See 6 Taunt. 424.) In the time of Blackstone, they took rank after him, and also after the antient serjeant.
2. The solicitor-general.
3. The premier serjeant (so constituted by special patent).
4. The antient serjeant, (or the first created among the queen's serjeants).
5. The queen's serjeants.
6. The queen's counsel; and those who have patents of precedence.
7. Serjeants at law.
8. The Recorder of London.
9. Advocates of the civil law.
10. Barristers.

It is to be observed, that this list does not include the *queen's advocate*, whose rank seems to be not fully settled. He is, however, usually placed immediately after the attorney-general. See Manning's "*Serviens ad Legem*," pp. (19), (20). It may also be noticed, that when there is a *queen consort*, her attorney and solicitor-general rank with those king's counsel who have patents of precedence. (Seld. Tit. of Hon. 1, 6, 7.)

(*l*) As to the privileges of serjeants not having patents of precedence, see *Memorandum* T. T. 1864, 16 C. B. (N. S.) 577.

(*m*) In the court of Exchequer, two barristers, called the *post*-man and the *tub*-man (from the places in which they sit), have a precedence in motions. (See R. *v.* Bishop of Exeter, 7 Mee. & W. 188.)

vants of the king, and, consequently, without any licence had for that purpose, may accept a retainer in any cause against the crown. And all other barristers, and all serjeants (other than king's serjeants) may indiscriminately take upon them the protection and defence of any suitors, whether plaintiff or defendant (*n*); who are therefore called their *clients*, like the dependents upon the antient Roman orators. [They indeed practised *gratis*, for honour merely, or at most for the sake of gaining influence; and so likewise it is established with us that a counsel can maintain no action for his fees (*o*); which are given, not as *locatio vel conductio*, but as *quiddam honorarium*; not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation (*p*). As it was also laid down with regard to advocates in the civil law (*q*), whose *honorarium* was

(*n*) At one time, an exception to this existed as regards the Court of Common Pleas, the serjeants having the exclusive privilege of being heard in that court, at its sittings in *banc*. And though in 1834 a warrant issued under the sign manual, directing that this privilege should cease, yet the Court of Common Pleas refused to act upon its authority, and decided that, as the privilege was founded on immemorial usage, it could not be taken away by the warrant of the crown. (Case of the Serjeants, 6 Bing. N. C. 235.) However it was enacted by 6 & 7 Vict. c. 18, s. 61, that, in appeals to the Common Pleas from the revision courts, all barristers should be entitled to audience. And afterwards by 9 & 10 Vict. c. 54, (see 8 C. B. 537,) it was provided generally, that all barristers, according to their respective rank and seniority, shall have equal right and privilege of practising, pleading, and audience, in the Common Pleas, with the serjeants. See also 20 & 21 Vict. c. 85, s. 15, allowing all barristers to practise in the Court of *Divorce*; 21 & 22 Vict. c. 95, s. 2, allowing them to practise in the *Court of Probate*; and 22 & 23 Vict. c. 6, allowing them to practise in the *High Court of Admiralty*.

(*o*) Davis, pref. 22; 1 Ch. Rep. 38. It has been made a question whether the rule invalidates a *special contract* to pay a fixed sum of money, instead of the usual fees for professional services to be rendered. See Kennedy *v.* Broun, 13 C. B. (N. S.) 677, and Mostyn *v.* Mostyn, Law Rep., 5 Ch. App. 457. In the analogous case of a *physician*, such an actual contract has been held capable of being enforced. (See Veitch *v.* Russell, 3 Q. B. 928, sup. p. 212.

(*p*) Davis, 23.

(*q*) Ff. 11, 6, 1.

[directed by a decree of the senate not to exceed in any case ten thousand sesterces, or about 80*l.* of English money (*s*). And, in order to encourage due freedom of speech in the lawful defence of their clients, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men, (a few of whom may sometimes insinuate themselves even into the most honourable professions,) it hath been holden that a counsel is not answerable for any matter by him spoken relative to the cause in hand, and suggested in his client's instructions; although it should reflect upon the reputation of another, and even prove absolutely groundless (*t*): but if he mention an untruth of his own invention, or even upon instructions, if it be impertinent to the cause in hand, he is then liable to an action from the party injured (*u*). And counsel guilty of deceit or collusion are made punishable by the statute of Westminster the first (3 Edw. I. c. 28) with imprisonment for a year and a day, and perpetual silence in the courts; a punishment that even in more modern times has been inflicted for gross misdemeanors in practice (*x*).]

We shall close this chapter with a remark applicable both to solicitors and counsel, viz. that they possess the exclusive privilege of transacting business in the courts of justice in matters in which they are not personally concerned. For no man can conduct the practical proceedings in a cause to which he is himself not party, unless he be an attorney (*y*); nor is any man allowed to address the

(*s*) Tac. Ann. 1, 11, 7.

(*t*) See Hodgson *v.* Scarlett, 1 B. & Ald. 232. But the subsequent publication of such matter is unlawful. (Flint *v.* Pike, 4 B. & C. 473.) As to the power and responsibility of counsel in binding their clients by arrangements entered into for them, in court, see In re Hoblen, 8 Beav. 101; Mole *v.* Smith, 1 Jac. & Walk. 673; Swinfen *v.* Swinfen, 18 C. B. 485; 1 C. B. (N. S.) 364; 24 Beav. 559; Chambers *v.* Mason, 5 C. B. (N. S.) 59; Swinfen *v.* Lord Chelmsford, 5 H. & N. 890; Strauss *v.* Francis, Law Rep., 1 Q. B. 379.

(*u*) Brook *v.* Sir H. Montague, Cro. Jac. 90.

(*x*) See Ray. 376.

(*y*) See 6 & 7 Vict. c. 73, s. 2. Independently of their exclusive

court, in such a cause, unless he be either attorney or counsel (*z*). In the superior courts, indeed, the latter province belongs to counsel alone, exclusively even of the attorneys (*a*).

right of conducting the practical proceedings (or business out of court), it is by solicitors alone that counsel are retained and instructed to address the court;—it being unusual for the counsel to communicate for these purposes with the party himself. It has been decided, however, that there is no compulsory rule on this subject; and that it is governed only by the conventional usage of the bar, founded on considerations of propriety and convenience. (See the judgment of Lord Campbell, Doe *d.* Bennett *v.* Hale, 15 Q. B. 171.)

(*z*) It is to be noticed, however, that by 15 & 16 Vict. c. 54, s. 10, it is provided, as to the *county courts*, that any person, though not himself a party nor either a barrister or attorney, may *by leave of the judge* address the court, on behalf of the plaintiff or defendant.

(*a*) Collier *v.* Hicks, 2 B. & Ad. 668. This privilege of counsel is of great antiquity. Notices of it occur in the reign of Henry the third. (Plac. Ab. 137; Canc. Rot. 22, temp. 32 Hen. 3; Matt. Par. Hist. p. 1077.) And it is probable that it was of much earlier date than this. As to the extent of this privilege at *quarter sessions*, see Ex parte Evans, 9 Q. B. 279. We may remark here that by 5 & 6 Vict. c. 109, s. 6, barristers and attorneys are exempt from serving as parish constables. They are also exempt from serving the office of overseer. (See Arch. Justice of the Peace, *Poor*, 113.) They are also exempt from serving on a jury. (See 33 & 34 Vict. c. 77, s. 9, and Sched.) Moreover, they are privileged from being arrested in civil cases, while attending the courts, *eundo, morando et redeundo*. See Newton *v.* Constable, 2 Q. B. 157; Flight *v.* Cook, 1 D. & L. 714; Phillips *v.* Pound, 7 Exch. 881; Jones *v.* Marshall, 2 C. B. (N. S.) 615; Ex parte Cobbett, 7 Ell. & Bl. 955.

CHAPTER IV.

OF THE INFERIOR COURTS OF JUSTICE.

WE are next to consider the several species and distinctions of courts of justice, which are acknowledged and used in this kingdom. [And we may observe that the policy of our antient constitution, as regulated and established by the great Alfred, was to bring justice home to every man's door, by constituting as many courts of judicature as there were manors in the kingdom; wherein injuries were redressed, in an easy and expeditious manner, by the suffrage of neighbours and friends. These little courts, however, communicated with others of a larger jurisdiction, and those with others of a still greater power; ascending gradually from the lowest to the supreme courts, which were respectively constituted to correct the errors of the inferior ones; and to determine such cases as, by reason of their weight and difficulty, demanded a more solemn discussion; the course of justice thus flowing in large streams from the king, as the fountain, to his superior courts of record: and being then subdivided into smaller channels, till the whole and every part of the kingdom were plentifully watered and refreshed (*a*).] Hence, some of these courts are *inferior* and others *superior;* and in the present chapter we propose to treat of the former class each in their turn, beginning with those

(*a*) Blackstone remarks (vol. iii. p. 31), that a similar institution (which he considers as "highly "agreeable to the dictates of natural "reason, as well as of more en- "lightened policy") prevailed in the Jewish Republic (see Exodus, xviii.), and also in Mexico and Peru, before their discovery by the Spaniards. (See Mod. Un. Hist. xxxviii. 469; xxxix. 14.)

which are coeval with our earliest records, and are dispersed generally throughout the kingdom, though (with regard to each particular court) confined to narrow local limits. But, first, we may make this general observation with regard to the jurisdiction of all inferior courts, viz., that it forms one of the provisions of the Judicature Act, 1873, that on that Act coming into operation on the 2nd November, 1874, it shall be lawful for her Majesty from time to time by order in council to confer on any inferior court of civil jurisdiction the same jurisdiction in equity as has been conferred (as we shall see hereafter) on the county courts, and the same jurisdiction in admiralty as has been conferred on certain of the county courts; and, further, that every inferior court which now or hereafter shall have jurisdiction in equity, or at law and in equity, and in admiralty respectively, shall, as regards all causes of action within its jurisdiction, have power to grant such relief, redress or remedy in as full and ample a manner as might be done in the like case by the High Court of Justice by that Act established (*b*). But to return to the different inferior courts.

I. The Court baron is a court incident to every manor in the kingdom, to be holden by the steward within the said manor (*c*). This court baron is of two natures (*d*): the one is a customary court, of which we formerly spoke, appertaining entirely to the *copyholders*, in which their estates are transferred by surrender and admittance, and other matters transacted relative to their tenures only (*e*). The other is a court of common law, held before the *freehold* tenants who owe suit and service to the lord of the manor, and are *pares* of each other, and bound by their feodal tenure to assist their lord in the dispensation of domestic justice; and of this court the steward of the manor is rather the registrar than the judge. These two

(*b*) 36 & 37 Vict. c. 66, ss. 88, 89.
(*c*) 4 Inst. 268.
(*d*) Co. Litt. 58.
(*e*) Vide sup. vol. I. pp. 215, 218.

species of courts baron, though in their nature distinct, are frequently confounded together (*f*). The freeholders' court, (with which alone, as being a court of *justice*, we are now concerned) was antiently held every three weeks; and its most important business was to determine, in the *real* action called the "writ of right," all controversies relating to lands within the manor (*g*). But this jurisdiction was greatly curtailed by 3 & 4 Will. IV. c. 27, s. 36, which abolished most of the real actions; and afterwards by 23 & 24 Vict. c. 126, s. 26, it was, in effect, enacted, that in all cases in which at the date of that Act a writ of right, or plaint for dower or free-bench, or a writ of *quare impedit*, might have been brought in any court, the action, if prosecuted at all, should be commenced by writ of summons in the Common Pleas at Westminster. In addition, however, to its jurisdiction in real actions, the court baron, at common law, might also hold plea of any *personal* actions, where the debt or damages did not amount to 40*s*. (*h*). But proceedings in a court baron were always liable to be removed into the superior courts by writs of *pone*, or *accedas ad curiam*, according to the nature of the suit (*i*); and, after judgment given, by a writ of *false judgment* requiring the courts at Westminster to rehear and review the cause (*k*); and from these circumstances (which were found productive of great vexation and delay), and also by reason of the general inefficiency of the tribunal, the court baron fell

(*f*) 3 Bl. Com. p. 34.

(*g*) Ibid.

(*h*) Finch, 248. It is observed, that the same sum—*i. e.* three marks—bounded also the jurisdiction of the *fierding* court, among the antient Goths; Bl. Com. ubi sup.; Stiernhook, De Jure Goth. l. i. c. 2.

(*i*) F. N. B. 4, 70; Finch, L. 444, 445. As to the practice on removal by writ of *pone*, see Robinson *v.* Mainwaring, 10 Q. B. 274.

(*k*) F. N. B. 18. As to writs of *false judgment*, see Scott *v.* Bye, 2 Bing. 344; Walker *v.* Watson, 8 Bing. 414; Finch *v.* Brook, 1 Bing. N. C. 253; S. C. 2 Bing. N. C. 324; Overton *v.* Swettenham, 3 Bing. N. C. 786; 1 Man. & Gr. 41, n. (*u*); Crookes *v.* Longden, 5 Bing. N. C. 410; Dempster *v.* Purnell, 1 D. P. C. (N. S.) 168; Brown *v.* Gill, 3 D. & L. 123.

long ago into almost entire disuse (*l*). And, moreover, as it does not belong to the class of courts *of record*, it comes within a provision of "The County Courts Act, 1867," which enacts that from the date of that Act no action or suit which can be brought in any county court shall thenceforth be commenced or be maintainable in any hundred or other inferior court not being a court of record (*m*).

II. [A hundred court is only a larger court baron, being held for all the inhabitants of a particular hundred, instead of a manor. The free suitors are here also the judges, and the steward, properly, the registrar,—as in the case of a court baron (*n*). Indeed, it resembles the former in all points, except that in point of territory it is of a greater jurisdiction (*o*). This court is said by Sir Edward Coke to have been derived out of the sheriff's county court for the ease of the people, that they might have justice done to them at their own doors, without any charge or loss of time (*p*); but its institution was probably coeval with that of hundreds themselves, which (as formerly observed) were derived from the polity of the antient Germans (*q*).]

(*l*) By 9 & 10 Vict. c. 95, s. 14, provision was made enabling the lord of any hundred or of any honor, manor or liberty, having any court in right thereof, in which debts or demands might be recovered, to surrender to her Majesty the right of holding such court; and that after such surrender such court should be discontinued.

(*m*) 30 & 31 Vict. c. 142, s. 28.

(*n*) As to the office of steward of the hundred court or court baron, see Bradley *v.* Carr, 3 Man. & Gr. 221.

(*o*) Finch, L. 248; 4 Inst. 267; By 9 & 10 Vict. c. cxxvi. the Hundred Court of *Salford* was made a court of record, with a constitution in general similar to that of a county court established under 9 & 10 Vict. c. 95.

(*p*) 2 Inst. 71.

(*q*) Vide sup. vol. I. p. 126. Blackstone remarks (vol. iii. p. 34), in reference to the *centeni*, or inhabitants of the *hundred* among the antient Germans, that Cæsar (De Bell. Gall. l. 6, c. 22) mentions the judicial power exercised by them in their hundred courts:—"*Principes regionum, atque pagorum, inter suos jus dicunt, controversiasque minuunt.*" Blackstone cites, also, the following passage from Tacitus:—"*Eliguntur in consiliis et prin-*

We may remark, with respect to this court, that causes therein were equally liable to removal, as from the court baron, and by the same writs, and that its decisions might also be reviewed by the same writ of false judgment. But in practice no resort to the hundred court has been made in recent times; and as it also is no court of record, it falls under the same provision in "The County Courts Act, 1867," to which we have referred in our account of the court baron (*r*).

III. The sheriff's county court is a common law court which exists in every county, and it is incident to the jurisdiction of that officer, as noticed in a former volume (*s*). It never ranked as a court of record, though from the earliest times down to the year 1846 it might hold pleas of debt or damages under the value of 40*s*. (*t*). It might even, by virtue of a special writ called a *justicies*, entertain all personal actions to any amount; for such writ empowered the sheriff, for the sake of dispatch, to do the same justice in his county court, as might otherwise be had at Westminster (*u*). And it might also hold plea of many "real" actions, before such actions were mostly abolished, as has just been mentioned (*v*). The freeholders of the county were the real judges in this court; the sheriff being the president only, and the officer to carry its decisions into execution (*x*). [The great conflux of freeholders, supposed always to attend at the county court,—which Spelman calls "*forum plebeiæ justitiæ et theatrum comitivæ potestatis*" (*y*),—is the reason why all acts of parliament at

cipes, qui jura per pagos vicosque reddunt: centeni singulis, ex plebe comites, consilium simul et auctoritas, adsunt" (De Mor. Germ. c. 13); and adds, that in the Gothic constitution the hundred court was denominated *hæreda*. (Stiernhook, De Jure Goth. l. i. c. 22.)

(*r*) 30 & 31 Vict. c. 142, s. 28, sup. p. 281.

(*s*) Vide sup. vol. II. p. 628.

(*t*) See 4 Inst. 266; Tinniswood *v.* Pattison, 3 C. B. 248.

(*u*) Finch, 318; F. N. B. 152; Com. Dig. (C.) 5, 7, 8.

(*v*) Vide sup. p. 280.

(*x*) 3 Bl. Com. p. 36.

(*y*) Gloss. v. Comitatus.

[the end of every session were wont to be there published by the sheriff; why all outlawries are still there proclaimed; and why all popular elections which the freeholders are to make,—as formerly of sheriffs and conservators of the peace, and now of coroners, verderors, and the like,—must be made *in pleno comitatu*, or in full county court (*z*). By the statute 2 Edw. VI. c. 25, it was enacted that this court shall never be adjourned longer than for one month, consisting of twenty-eight days; and this was also the antient usage, as appears from the laws of King Edward the elder (*a*): "*præpositus* (that is, the sheriff) *ad quartam circiter septimanam frequentem populi concionem celebrato: cuique jus dicito: litesque singulas dirimito.*" In those antient times this county court was of great dignity and splendour; the bishop and the ealdorman (or earl), with the principal men of the shire, sitting therein to administer justice, both in lay and ecclesiastical causes (*b*).] But its dignity became much impaired, when the bishop was prohibited and the earl neglected to attend it; and in modern times little resort was made to it as a court for the recovery of debt or damages. And now its jurisdiction in this respect seems to be wholly superseded, by the creation of the modern courts of the same name, to which we are about to advert.

IV. The County Courts—the establishment of which took place as follows:—

The disuse into which the contentious jurisdiction of the sheriff's county court gradually fell, was chiefly owing to the dilatory and expensive character of its proceedings, as applied to the recovery of demands of small amount; and as the remedy afforded by the superior courts was, in this respect, still more objectionable, this state of things

(*z*) It may be noticed that the office of verderor of the forest of Epping, after thirty years desuetude, was revived in the year 1871. As to verderors, see Reg. *v.* Conyers, 8 Q. B. 981.

(*a*) C. 11.

(*b*) Wilkins's Leg. Anglo-Sax. LL. Eadg. c. 5.

gave rise, long since, to the formation of courts *of requests* or *conscience* (as they were indifferently called) in various parts of the kingdom by special Acts passed for that purpose. These local courts, however, proved in their turn inadequate to the purpose,—chiefly because confined to sums of too trivial an amount, and extending only to particular places or small districts (*c*). And the necessity being generally felt of providing throughout the whole kingdom some satisfactory mode of recovering debts and demands below the amount which would justify the expense and delay of having recourse to the superior courts (*d*),—it was conceived that for this purpose there might be advantageously established throughout the country at large, a system of inferior courts with better machinery and a more ample jurisdiction than those hitherto in use; and which should have the name of county courts, as being in some sense a graft upon the common law court of that name (*e*). This design was carried out in the year 1846, and having been since found to work satisfactorily, the jurisdiction originally conferred on the tribunals then created has been largely increased in a variety of directions. Of the general system thus established by the 9 & 10 Vict. c. 95, and by the statutes

(*c*) The several courts of conscience or request then in existence were in effect abolished (subject only to a few exceptions) by 9 & 10 Vict. c. 95, and the Order in Council, 9th May, 1847. It was also afterwards provided, by 15 & 16 Vict. c. 54, s. 7, that on the petition of the council of any borough, or the majority of the ratepayers of any parish, within the limits of which any court of local jurisdiction other than a county court is established,—her Majesty might, by order in council, exclude the jurisdiction of such local court, throughout the whole, or any part, of the district of the county court existing within the same limits, so far as matters within the jurisdiction of the county court were concerned.

(*d*) See preamble of 9 & 10 Vict. c. 95.

(*e*) It is, however, to be remarked, that, beyond the name common to both, there seems but little connection between the two; and that, whereas there is but a single sheriff's county court for the whole of a county, every county is now portioned out into districts, for each of which there is a county court held in the most convenient town within such district.

subsequently passed for its amendment or extension, a short account shall here be given (*f*).

The Act of 1846 directed that this new plan of judicature should be established by her Majesty in council, in such counties as should be thought fit (*g*); which was accordingly done by an order in council of the 9th March, 1847; and by the same order,—as well as by authority of the Lord Chancellor under a subsequent Act (*h*),—a certain number of county court *districts* are appointed in each county. In some convenient place or places in each of the districts so appointed (*i*), the court for that county is held, as the general rule, once in every calendar month, or at such other interval as is directed by the Lord Chancellor (*k*); and such court is constituted a court of record (*l*). The county court districts are grouped in unequal numbers into a variety of circuits (*m*); and to each of these is assigned a judge, chosen by the Lord Chancellor from amongst the serjeants, queen's counsel and barristers-at-law of seven years' standing and upwards (*n*); and for each district there is a registrar (*o*)

(*f*) These are 12 & 13 Vict. c. 101; 13 & 14 Vict. c. 61; 15 & 16 Vict. c. 54; 17 & 18 Vict. c. 16; 19 & 20 Vict. c. 108; 20 & 21 Vict. c. 36; 21 & 22 Vict. c. 74; 22 Vict. c. 8; 28 & 29 Vict. c. 99; 29 & 30 Vict. c. 14; 30 & 31 Vict. c. 142; 31 & 32 Vict. c. 71; 32 & 33 Vict. c. 51; 33 & 34 Vict c. 15, c. 30; 36 & 37 Vict. c. 52.

(*g*) 9 & 10 Vict. c. 98, s. 1. The courts of the universities of Oxford and Cambridge are exempted from the Act (sects. 1, 140, 141).

(*h*) 21 & 22 Vict. c. 74.

(*i*) 9 & 10 Vict. c. 95, s. 2.

(*k*) Sects. 2, 56; 30 & 31 Vict. c. 142, s. 19. In some of the smaller districts the court is held only once in every two or in every three months. In others, the court sits at several times during the month according to the exigency of the business.

(*l*) 9 & 10 Vict. c. 95, s. 3.

(*m*) For the circuit which includes the district of Liverpool, there are two judges. On the 31st December, 1872, the total number of circuits was fifty-nine, exclusive of the City of London Court.

(*n*) The judge is allowed to appoint a deputy being a barrister of seven years' standing, in case of his own illness or unavoidable absence. (See 9 & 10 Vict. c. 95, s. 20; 19 & 20 Vict. c. 108, ss. 6—11.)

(*o*) The registrar is appointed by the judge, subject to the approval of the Lord Chancellor; a deputy registrar may be appointed by the registrar, subject to the approval of the judge.

and other officers (*p*); and (by 30 & 31 Vict. c. 142) a plaintiff may enter his claim in the county court within the district of which the defendant shall dwell or carry on business at the time of bringing the action or suit (*q*),—or (by leave of the judge or registrar) in the county court within the district in which such defendant shall have dwelt or carried on business within the six calendar months next preceding,—or (by the like leave) in the county court in the district in which the cause of action wholly or in part arose, without regard to the place of residence or business of the defendant (*r*).

The county courts thus constituted have jurisdiction, primarily and principally, for the recovery of small debts and demands; and such jurisdiction includes generally all actions where the debt, damage or demand claimed is not more than 50*l.*, whether on balance of account, or otherwise (*s*). But to this there are certain qualifications: for the jurisdiction of the court does not extend, except where the value or rent of the property in dispute shall not exceed 20*l.* per annum (*t*), to the action for recovery of land called an ejectment, or to any action in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market or other franchise shall be *bonâ fide* in question (*u*); nor to an action in which the validity of any devise, bequest, or limitation, under will or settle-

(*p*) 9 & 10 Vict. c. 95, s. 3, and see sects. 9, 23, 24, 31; 19 & 20 Vict. c. 108, ss. 6—17.

(*q*) As to the *metropolitan* districts, see 19 & 20 Vict. c. 108, s. 18; 30 & 31 Vict. c. 142, s. 3.

(*r*) See 30 & 31 Vict. c. 142, s. 1, in substitution for 9 & 10 Vict. c. 95, s. 60.

(*s*) Sect. 58; 13 & 14 Vict. c. 61; 19 & 20 Vict. c. 108, s. 24. As to the action of *replevin*, see 9 & 10 Vict. c. 95, s. 119; 19 & 20 Vict. c. 108, s. 66.

(*t*) See Brown *v.* Cocking, Law Rep., 3 Q. B. 672; Elston *v.* Rose, 4 Q. B. 4; 30 & 31 Vict. c. 142, ss. 11, 12. Prior to these enactments, actions of ejectment or involving title to corporeal or incorporeal hereditaments were altogether excluded from the jurisdiction of the county court. (9 & 10 Vict. c. 95, s. 58.)

(*u*) Ibid. See Pearson *v.* Glazebrook, Law Rep., 3 Exch. 27. It may be open to some doubt whether the jurisdiction conferred by 30 & 31 Vict. c. 142, ss. 11, 12, extends to cases respecting a toll, fair, market or other franchise.

ment, may be disputed (*x*); nor to an action for a malicious prosecution, libel, slander, seduction, or breach of promise of marriage (*y*). However, *by agreement in writing of both parties*, the jurisdiction of the county court is made capable of embracing any action whatever which may be brought in any superior court of common law (*z*). And by 30 & 31 Vict. c. 142, s. 10, the defendant in any action in the superior court for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort, may, under certain circumstances, obtain an order remitting the cause to be tried in a county court (*a*). In order, moreover, to promote the resort to the county courts in cases of no considerable amount, it is enacted by 30 & 31 Vict. c. 142, s. 5, that, if in any action in the superior court the plaintiff shall recover no more than 20*l.* (if the action is founded on contract), or 10*l.* (if founded on tort), he shall not be entitled to any costs of suit unless the judge shall certify on the record that there was sufficient reason for bringing the action in such superior court, or unless the court or a judge at chambers shall, by rule or order, allow such costs (*b*); and, further, that,

(*x*) 9 & 10 Vict. c. 95, s. 58. But an undisputed legacy, or distributive share under an intestacy to the amount of 50*l.*, may be recovered in the county court. (9 & 10 Vict. c. 95, s. 65; 13 & 14 Vict. c. 61.) And this exception to its jurisdiction must be taken subject to the *equitable* jurisdiction conferred by 28 & 29 Vict. c. 99, as to which vide post, p. 290.

(*y*) 9 & 10 Vict. c. 95, s. 58.

(*z*) 19 & 20 Vict. c. 108, s. 23. See also sect. 25.

(*a*) See Craven *v.* Smith, Law Rep., 4 Exch. 146; Gray *v.* Wish, ib. 4 Q. B. 175; Lewis *v.* Sanderson, ib. 330; Sampson *v.* Mackay, ib. 643. The mode of obtaining such order is to make affidavit that the plaintiff has no visible means of paying the defendant's costs. But the plaintiff may avoid the order by giving security for such costs, or satisfying the judge that he has a cause of action fit to be prosecuted in the superior court. (30 & 31 Vict. c. 142, s. 10, and see 36 & 37 Vict. c. 66, s. 67.)

(*b*) And see 36 & 37 Vict. c. 66, s. 67. As to the case of an action by or against the judge or officer of a county court, see 19 & 20 Vict. c. 108, ss. 19—21; Mann *v.* Bucherfield, 20 L. J., Q. B. 265. See also 30 & 31 Vict. c. 142, s. 29, containing a similar enactment in regard to actions or suits brought unne-

in any action of contract in a superior court where the claim does not exceed 50*l.*, the defendant may call on the plaintiff to show cause why the action should not be tried in the county court; and, unless there be good cause shown, an order to that effect shall be made accordingly (*c*).

The Acts also regulate the course of the proceedings,—for the particulars of which we must refer to the enactments themselves, and the general rules and orders passed under their authority (*d*). We may, however, mention generally, that the first step in the proceedings is to enter a *plaint* in a book kept by the registrar for the purpose (*e*), which is followed by a *summons*, served by the officer of the court on the defendant (*f*); and upon the day in that behalf named in the summons the plaintiff must appear, and the defendant must also appear and answer; and, upon the parties answering to their names, the judge proceeds in a summary way to try the cause (*g*);

cessarily in inferior courts other than the county court, and in which less than 10*l.* shall be recovered.

(*c*) 30 & 31 Vict. c. 142, s. 7 (and see 36 & 37 Vict. c. 66, s. 67). On the other hand, it is provided by 19 & 20 Vict. c. 108, s. 39, that if, in an action on contract commenced in a county court, the plaintiff claims more than 20*l.*, or in an action of *tort* (that is, for wrong independent of contract) more than 5*l.*, and the defendant gives notice that he objects to the action being tried in such court, and gives security for the amount with costs,—all proceedings in the County Court shall be stayed.

(*d*) See the rules, orders and forms for regulating the practice of the county courts, which came into force on 1st January, 1868; superseding, with a few exceptions, those previously issued.

(*e*) 9 & 10 Vict. c. 95, s. 59.

(*f*) Ib. By the 47th of the above "Rules and Orders," the summons is to be dated on the day on which the plaint was entered, and its date is to be the *commencement of the suit*.

(*g*) 9 & 10 Vict. c. 95, s. 74. There are some few special matters of defence (viz., set-off, infancy, coverture, statute of limitations and bankruptcy discharge), on which, if the defendant intends to rely, he must give due notice to the registrar, by whom the same will be communicated to the plaintiff. (Sect. 76.) And if the action be brought for the price or value of goods sold and delivered to the defendant, to be dealt with in the way of his trade, profession or calling, the plaintiff may issue a special summons; and, unless the defendant shall give due notice of his intention to defend, may sign judgment for the amount of his claim, without establishing it by any proof. (30 & 31 Vict. c. 142, s. 2.)

and gives judgment upon such evidence—taken *vivâ voce* and upon oath—as the parties on either side shall adduce. And it is provided, that the judge, in all actions, shall determine all questions, as well of fact as of law, unless a jury shall be summoned (*h*). But when the amount claimed exceeds 5*l.*, a jury may be summoned, at the requisition either of plaintiff or defendant; and even where it does not exceed 5*l.*, a jury may be summoned, at discretion of the judge, on application of either of the parties (*i*), —such jury (in either case) to consist of five persons qualified to serve as jurors in the superior courts; and they must be unanimous in their verdict (*j*). When the judge orders a sum of money to be paid by one party to the other, and the order for payment is not complied with, execution may issue against the goods of the judgment debtor (*k*); and if he has the means to pay at the date of the judgment or at any time afterwards, he may, on such fact being established to the satisfaction of the judge, be committed to prison for any period not exceeding forty days, though he may obtain his liberty at any time by paying the sum ordered (*l*).

Finally, we may observe that it is competent to the judge, after having given his decision, to accede, if he so think fit, to an application that there shall be a new trial, and may impose such terms as he shall think reasonable (*m*). And also, that when the debt or damage claimed

(*h*) 9 & 10 Vict. c. 95, s. 69.

(*i*) Sect. 70.

(*j*) Sects. 72, 73.

(*k*) But his wages may not be attached, though it was at one time otherwise (33 & 34 Vict. c. 30).

(*l*) The defendant can only be so committed after being summoned to show cause why he does not pay the sum for which judgment was obtained, or if such sum was ordered to be paid by instalments, why he does not pay such instalment. On the hearing of such *judgment summons*, such fresh order may be made as to the payment of the sum for which judgment was obtained as the court shall think fit. The law as to committal of a debtor on a judgment summons is now regulated by the Debtors Act, 1869 (32 & 33 Vict. c. 62). It has been held that no fresh commitment can be made in respect of a second default in paying a particular sum of money ordered to be paid. (Horsnail *v.* Bruce, Weekly Notes, 17 May, 1873.)

(*m*) 9 & 10 Vict. c. 95, s. 89.

is above 20*l.*, an *appeal* lies from the decision of the judge upon any matter of law, or upon the admission or rejection of any evidence (*n*). But the appellant must give security for the costs of the appeal, and, if he be defendant, for the amount also of the judgment; and no appeal will lie, if before the decision is pronounced both parties shall have agreed in writing that the decision of the judge shall be final (*o*).

The scope of these courts was at first confined, in regard to their ordinary and litigious jurisdiction, to such matters as could be concurrently brought in one of the superior courts of law; but, as their convenience became more appreciated, the opinion gradually gained ground that it would be desirable to confer on them an analogous jurisdiction in cases involving questions of *equity* where comparatively small interests were involved, and which would otherwise have to be entertained, if at all, through the expensive and dilatory method of proceedings in Chancery. For this purpose there was passed in the year 1865 the 28 & 29 Vict. c. 99, entitled "An Act to confer on the County Courts a limited Jurisdiction in Equity." Of this statute it would be improper here to give any detailed account; but it may be desirable to state that under its provisions the county courts have now (subject to appeal) all the powers and authority of Chancery in the following

(*n*) This appeal is given by 13 & 14 Vict. c. 61, s. 14, and according to that enactment the appellant may bring it in any of the superior courts of common law. But it forms one of the provisions of the Judicature Act, 1873, that after the 2nd November, 1874, such appeals shall be heard and determined by a divisional court of the High Court of Justice, established by that Act. (36 & 37 Vict. c. 66, s. 45.) As to the appeal from the county court, see The London and North Western Railway Company, app. *v.* Grace, resp., 2 C. B. (N. S.) 555; Warner *v.* Riddeford, 4 C. B. (N. S.) 180; Carr *v.* Stringer, 1 Ell. Bl. & Ell. 123; Stone *v.* Dean, ib. 504; Waterton *v.* Baker, Law Rep., 3 Q. B. 173; Gage *v.* Collins, ib. 2 C. B. 381.

(*o*) 19 & 20 Vict. c. 108, s. 69. As to *costs* in county courts, see sects. 33—37, and the Scale of Costs appended to the Rules and Orders of January, 1868. As to writs of *certiorari*, or *prohibition*, or *mandamus*, to those courts, 19 & 20 Vict. c. 108, ss. 38—44, 49, 67.

matters (*p*):—1. Account or administration suits wherein the estate does not exceed in value the sum of 500*l*. 2. Suits for the execution of trusts in which the estate or fund shall not exceed the same amount (*q*). 3. Foreclosure and redemption suits, or for enforcing any charge or lien, where the mortgage charge or lien shall not exceed that sum. 4. Suits for specific performance, or for the rectification, of agreements where the property sold or leased does not exceed that amount in value (*r*). 5. Proceedings under the Trustee Relief Acts, with a similar qualification as to the value of the property. 6. Proceedings as to the maintenance or advancement of infants,—with a similar qualification. 7. Suits for the dissolution or winding-up of partnerships,—the assets not exceeding that amount. 8. Proceedings for orders in the nature of injunctions, arising out of the equitable jurisdiction conferred by the Act (*s*).

In the year 1868 the policy of still increasing the jurisdiction of these courts received a further development by conferring upon such of them as are held in the neighbourhood of the sea a limited jurisdiction in admiralty; and this was carried into effect by the 31 & 32 Vict. c. 71, amended by the 32 & 33 Vict. c. 51 (*t*). The jurisdiction thus conferred extends to the following matters:—1. Salvage. 2. Claims for towage, necessaries or wages.

(*p*) 28 & 29 Vict. c. 99, s. 1. Under this Act the appeal shall be heard before one of the vice-chancellors. But it forms one of the provisions of the Judicature Act, 1873, that after the commencement of that Act on the 2nd November, 1874, county court appeals shall be heard before a divisional court of the High Court of Justice. (36 & 37 Vict. c. 66, s. 45.)

(*q*) This jurisdiction includes *constructive* trusts. (Clayton *v.* Renton, Law Rep., 4 Eq. Ca. 158.

(*r*) See 30 & 31 Vict. c. 142, s. 9; Wilson *v.* Marshall, Law Rep., 3 Eq. Ca. 270.

(*s*) By 30 & 31 Vict. c. 142, s. 8 (and see 36 & 37 Vict. c. 66, s. 67), provisions are made for the *transfer* of proceedings commenced in Chancery to a County Court. It may also be noticed that, by sect. 26 of this last Act, any money paid into court in equitable proceedings is to be invested by the registrar, within forty-eight hours, in the post-office savings-bank of the town.

(*t*) See Hewitt *v.* Cory, Law Rep., 5 Q. B. 418.

3. Claims for damage to cargo or by collision. 4. Claims arising out of agreements made in relation to the use or hire of any ship, or to the care of goods therein, or to any claim in tort in respect of goods carried therein. And, lastly, in the year 1869, when the bankruptcy law was remodelled, the administration thereof was also entrusted (except in the district of the London Court of Bankruptcy) to certain of these courts by the 32 & 33 Vict. c. 71,—the Bankruptcy Act of that year (*u*).

In addition to the jurisdictions already mentioned, the judges of the county courts have a variety of others,—some of which are of an original, and others of an auxiliary kind. But, as they are numerous and are moreover unconnected in general with the main object for which these courts have been established, no specific account of them can here be attempted (*v*).

V. The several courts which exist within many of the

(*u*) By 32 & 33 Vict. c. 71, s. 59, the court "having jurisdiction in bankruptcy" is defined to be (beyond the London bankruptcy district) the county court of the district wherein the debtor resides or carries on his business; but by sect. 79, the Lord Chancellor was enabled, by order, to exclude any county court from having jurisdiction in bankruptcy, and for the purpose of bankruptcy to attach its district to any other county court. Accordingly, under such an order, bearing date 1st January, 1870, the jurisdiction in bankruptcy was centralized in certain convenient districts, to the exclusion of the other county court districts of that county.

(*v*) The following enactments confer miscellaneous jurisdiction on the judges of the County Courts, in reference to their several objects:—16 & 17 Vict. c. 51 (The Succession Duties Act, 1853);—c. 107 (The Customs Act, 1853);—c. 137 (The Charitable Trusts Act, 1853);—17 & 18 Vict. c. 104 (The Merchant Shipping Act, 1854);—c. 112 (The Literary and Scientific Institutions Act, 1854);—18 & 19 Vict. c. 32 (Stannary Courts Amendment Act);—c. 63 (Friendly Societies Act);—c. 67 (Summary Procedure on Bills of Exchange and Promissory Notes Act);—c. 121 (The Nuisances Removal Act for England, 1855);—c. 122 (The Metropolitan Building Act, 1855);—17 & 18 Vict. c. 108, s. 73 (Acknowledgments of Married Women);—21 & 22 Vict. c. 70, s. 8 (The Designs Act, 1858);—c. 95, ss. 10, 13 (Probates and Administrations);—23 & 24 Vict. c. 136 (The Charitable Trusts Act, 1860);—25 & 26 Vict. c. 87 (The Industrial and Provident Societies Act, 1862);—c. 89, s. 126 (The Companies Act, 1862);—30 & 31 Vict. c. 131 (The Companies Act, 1867);—36 & 37 Vict. c. 52 (Small Intestate Estates).

cities, boroughs and corporations throughout the kingdom, and which are held by prescription, charter, or act of parliament,—will next come under our consideration (*w*). Of these borough and other local courts it may be said in general, that they arose originally from the favour of the Crown to those particular districts wherein we find them erected, so that their inhabitants might prosecute their suits and receive justice at home (*x*). It is also to be observed, that by the Municipal Corporations Act, (5 & 6 Will. IV. c. 76,) in those boroughs to which that Act extends and in which there is a separate court of quarter sessions,—the recorder is constituted, by virtue of his office, the judge of any court of record for civil actions existing within the borough,—that is to say, provided such court be not regulated by the provisions of any local Act, or if a barrister of five years' standing did not sit as a judge or assessor therein when the Municipal Act passed; and provisions are also contained in that statute to regulate the jurisdiction of such courts of record and the qualification and summoning of jurors therein (*y*). Under 2 & 3 Vict. c. 27, it is moreover required that every borough court of record shall be open for the trial of issues of fact and of law four times at least in each year,—and with no

(*w*) The chief of these which exist within the *City of London* are as follows:—1. The *Court of Hustings*, which is a tribunal analogous to the sheriff's county court. 2. The *Lord Mayor's Court*. As to this court, see the Lord Mayor of London *v.* Cox, Law Rep., 2 H. L. 239; Davies *v.* MacHenry, Law Rep., 3 Ch. Ap. 200; and the statute 20 & 21 Vict. c. clvii, by which Act its practice and procedure were amended and its powers enlarged. In this court the recorder, or, in his absence, the common-serjeant, presides as judge. 3. The *City of London* (formerly called the *Sheriffs' Court*, which is now classed as one of the county courts. (See 30 & 31 Vict. c. 142, s. 35.)

(*x*) A detailed statement as to all the borough and other local courts throughout the kingdom, as they existed prior to the year 1846, showing the extent of their jurisdiction, the authority under which they were usually held, and their forms of process, &c.—will be found in the Fourth Report of the Common Law Commissioners appointed in 1828, Appendix, Part II.

(*y*) 5 & 6 Will. 4, c. 76, s. 118, &c.; and see 6 & 7 Will. 4, c. 105, s. 9; 7 Will. 4 & 1 Vict. c. 78, ss. 32—36.

greater interval than four calendar months. But it is to be noticed that by 15 & 16 Vict. c. 54, s. 7, the council of any borough or ratepayers of any parish within the limits of which any local court other than a county court is established, may petition the Crown in council for the exclusion from such local court of all causes whereof the county court has cognizance. And that by 30 & 31 Vict. c. 142, s. 29, it is enacted that where any action or suit which could have been brought in a county court, shall be brought in any other court than one of the superior courts of law, and the verdict recovered shall be for a less sum than 10*l.*, the plaintiff shall have no more costs from the defendant than if the proceeding had been in the county court,—unless the judge before whom it is tried shall certify that it was properly brought in his court.

On the other hand, by an Act passed in the year 1872 provisions have been made with the object of giving greater vitality to these local tribunals, and securing more efficiency in their proceedings (*z*). For by the "Borough and Local Courts Act" of that year (35 & 36 Vict. c. 86), it is provided that in all cases wherein final judgment shall have been obtained in one of these courts, wherein the debt or damage shall not exceed twenty pounds exclusive of costs; and also in all cases where any rule or order shall be made by the judge for payment of money not exceeding that sum; such court shall be at liberty to send a writ or precept for the recovery of the same to the registrar of any county court, within the jurisdiction of which the defendant may possess any goods or chattels: and such writ or precept shall thereupon be executed by the high bailiff of such county court, who shall make his return to

(*z*) By 15 & 16 Vict. c. 76 ("The Common Law Procedure Act, 1852"), s. 228, her Majesty is empowered to direct from time to time, by order in council, that all or any part of the provisions of that Act, or of the rules made in pursuance thereof, shall apply to all or any courts of record in England or Wales; and a similar provision is contained in the 17 & 18 Vict. c. 125 ("The Common Law Procedure Act, 1854"), s. 105, and in the 23 & 24 Vict. c. 126 ("The Common Law Procedure Act, 1860"), s. 44.

the bailiff or serjeant at mace of the local court; and in all matters done under such writ or precept, the high bailiff shall be under the direction and control of the judge of the county court of which he is the officer (*a*). And the same Act also contains provisions enabling the judge of any court to appoint a deputy or assistant judge to execute any particular portion or duty of such judge (such appointment being under such regulations as may be directed by order in council), provided such deputy be a barrister of not less than seven years' standing (*b*); and authorizing two or more courts to be held at the same time either for the trial of issues or for the ordinary proceedings of the court (*c*).

To this Act there is appended a schedule of additional provisions which (as also the provisions with regard to interpleader claims contained in 1 & 2 Will. IV. c. 58) may be applied wholly or in part to all or any local courts of record in England or Wales by order in council. These provisions have reference chiefly to the course of the court; the statement of special cases by the parties in any action after issue joined, by consent and by order of the registrar, for the opinion of a superior court; for the removal of judgments or orders for not less than twenty pounds exclusive of costs into such court; and for the settlement by the judge of the fees which may be taken by the bailiff, the registrar, and other officers of the court. But the table of fees so settled must be submitted to and confirmed by two judges of the superior court before they become of any validity.

From borough and other local courts of record, error lies in general to the Queen's Bench (*d*).

(*a*) 35 & 36 Vict. c. 86, s. 6.

(*b*) Sect. 7.

(*c*) Sect. 4.

(*d*) It forms one of the provisions of the Judicature Act of 1873, that all appeals from any inferior court which might have been brought to any court whose jurisdiction is by that Act transferred to the High Court of Justice, shall (after the commencement of the Act in November, 1874) be heard and determined in a divisional court of the High Court (36 & 37 Vict. c. 66, s. 45).

VI. The courts of the Commissioners of Sewers. These are tribunals erected by virtue of a commission under the great seal pursuant to the statute of sewers (23 Hen. VIII. c. 5), whose powers are confined to such county or particular place as their commission shall expressly name (*e*). The jurisdiction of these commissioners is to overlook the repairs of the banks and walls of the sea coast and of navigable rivers, (or, with consent of a certain proportion of the owners and occupiers, to make new embankments,) and also to cleanse such rivers, and the streams communicating therewith (*f*). [These are courts of record, and consequently may fine and imprison for contempt (*g*); and in the execution of their duty they may proceed by jury, or upon their own view, and may take order for the removal of any annoyances, or the safeguard and conservation of the sewers within their commission, either according to the laws and customs of Romney-marsh or otherwise at their own discretion (*h*). They may also assess such rates, or scots, upon the owners of lands within their district as they shall judge necessary: and, if any person refuses to pay them, the commissioners may levy the same by distress of his goods and chattels; or they may sell his

(*e*) This statute of sewers was amended by 13 Eliz. c. 9; 3 & 4 Will. 4, c. 22; 4 & 5 Vict. c. 45, and 12 & 13 Vict. c. 50. As to its construction, see Callis on Sewers, Emerson *v.* Saltmarshe, 7 Ad. & Ell. 266; Taylor *v.* Loft, 8 Exch. 269; The Queen *v.* Baker, Law Rep., 2 Q. B. 621. As to the sewers of the *Metropolis*, see 18 & 19 Vict. cc. 30, 120, ss. 146—148; 21 & 22 Vict. c. 104, s. 1; 25 & 26 Vict. c. 102, ss. 1, 2—6, 22, 44—57, 59, 61, 66, 68, 69; 32 & 33 Vict. c. 102.

(*f*) By 3 & 4 Will. 4, c. 22, s. 10, the nature of the banks, streams, &c. falling within the jurisdiction of the commissioners is defined. And see further as to the extent of their power, sects. 19, 21 of the same Act.

(*g*) See Inhabitants of Oldbury *v.* Stafford, 1 Sid. 145.

(*h*) Romney-marsh, in the county of Kent, a tract containing 24,000 acres, is governed by certain antient and equitable laws of sewers, composed by Henry de Bathe, a venerable judge in the reign of King Henry the third; from which laws, it has been remarked, all commissioners of sewers may receive light and direction. (See 4 Inst. 276.)

[lands in order to pay such scots or assessments (*i*).] And by a statute, 24 & 25 Vict. c. 133, passed in the year 1861, (chiefly in reference to the drainage of land for agricultural purposes,) it was made lawful for her Majesty, upon the recommendation of the inclosure commissioners, to direct commissions of sewers into all parts of England, *inland* as well as maritime (*k*); and to assign as the limits for their jurisdiction any areas that, having regard to facilities for draining, might be thought most expedient; and it is enacted, that their powers shall extend not only to the maintenance and improvement of existing works in reference chiefly to sewers and other watercourses, outfalls and defences against water, but also to the construction of new ones (*l*). In cases, however, where land is to be purchased for new works otherwise than by agreement with the owner thereof, the commissioners must obtain the sanction of parliament (*m*); and provisions are made to ensure due compensation being afforded to

(*i*) As to sewers rates, see 23 Hen. 8, c. 5; 7 Ann. c. 10; 3 & 4 Will. 4, c. 22; 4 & 5 Vict. c. 45; 12 & 13 Vict. c. 50, ss. 2, 7; 24 & 25 Vict. c. 133, s. 38.

(*k*) The Act is not however to include the *Metropolis* as defined by 18 & 19 Vict. c. 120. It may be noticed that 24 & 25 Vict. c. 133, Part II., authorizes the constitution, with the consent of the inclosure commissioners, of *elective drainage districts* throughout the country; within which districts, respectively, all matters of drainage shall be vested in a Board having the same powers as commissioners of sewers. But no such district may be made within the limits of any commission of sewers, or of any borough or district under a local board of health, or improvement commissioners, without the consent of the commissioners, council or board, as the case may be (sect. 63). We may also here mention two recent statutes passed mainly with the object of facilitating the distribution (under the superintendence of the different sewer authorities and for agricultural purposes), of *sewage matter* over lands. These are the 28 & 29 Vict. c. 75, and the 30 & 31 Vict. c. 113. (And see 32 & 33 Vict. c. 100.)

(*l*) The term *watercourse* in this Act is to include "all rivers, streams, drains, sewers and passages through which water flows." (24 & 25 Vict. c. 133, s. 3.) The powers of the commissioners are particularly defined in sects. 16—18.

(*m*) As to the mode of obtaining such sanction, see 24 & 25 Vict. c. 133, ss. 22—26.

owners of property interfered with for the objects of the Act (*m*).

[In the reign of King James the first (8th Nov. 1616), the privy council took upon them to order, that no action or complaint should be prosecuted against the commissioners of sewers, unless before the council itself; and committed several to prison who had brought such actions at common law, till they should release the same: and one of the reasons for discharging Sir Edward Coke from his office of lord chief justice was for countenancing those legal proceedings (*n*). The pretence for which arbitrary measure was no other than the tyrant's plea of the *necessity* of unlimited powers in works of evident utility to the public, "the supreme reason above all reasons, which "is the salvation of the king's lands and people" (*o*).] But now it is clearly held that this (as well as all other inferior jurisdictions) is subject to the discretionary coercion of the Queen's Bench (*p*).

VII. The Court for the Stannaries of Cornwall and Devon, for the administration of justice among the tinners therein, is also a court of record with a special jurisdiction. [It is held before a judge called the vice-warden; and it is founded on an antient privilege granted to the workers in the tin mines, to sue and be sued in their own court, so that they may not be drawn from their business, which is highly profitable to the public, by attending their lawsuits in other courts (*q*). The privileges of the tinners are confirmed by a charter of the thirty-third year of Edward the first, and fully expounded by a private statute set forth in the Institutes (*r*), which has since been explained by a public Act, 16 Car. I. c. 15; and their courts, which were

(*m*) 24 & 25 Vict. c. 133, s. 18 et seq.

(*n*) Moor, 825, 826.

(*o*) Milt. Parad. Lost, iv. 393.

(*p*) Smith's case, 1 Ventr. 66; The Case of Cardiff Bridge, Salk. 146; Hetley *v.* Boyer, Cro. Jac. 336; vide sup. p. 295, n. (*d*).

(*q*) 4 Inst. 232.

(*r*) Ibid.

[formerly distinct for the several stannaries, are now united into one, and regulated by recent statutes (*s*). What relates to our present purpose is only this: that all tinners and labourers in and about the stannaries, during the time of their working therein *bonâ fide*, may sue and be sued in this court in all matters arising within the stannaries, excepting pleas of land, life and member (*t*). From all decrees and orders of the vice-warden on the equity side of his court, and from all his judgments on the common law side thereof, there has hitherto been an appeal to the lord-warden, (assisted by two or more legal assessors,) with a final appeal to the judicial committee of the privy council (*u*).]

VIII. There is another species of inferior courts, which must not be passed over in silence, viz., the Courts of the Universities of Oxford and Cambridge (*x*). To these

(*s*) 6 & 7 Will. 4, c. 106; 2 & 3 Vict. c. 58; 11 & 12 Vict. c. 63; 18 & 19 Vict. c. 32, and 32 & 33 Vict. c. 19; and see, as to these courts, Carew's History of Cornwall; Doderidge's History of Cornwall, p. 94; Rowe *v.* Brenton, 8 B. & C. 737; and Harvey *v.* Gilbard, 1 W. W. & H. 552.

(*t*) Until the establishment of the county courts under 9 & 10 Vict. c. 95, the actual labourers were privileged not to be sued in any *other* court than those of the stannaries, in matters arising *within the stannaries*. (See the Laws of the Stannaries, p. 35.) But now the plaintiff, in such cases, may choose between the stannary court and the county court of the district in which the cause of action arose. (See 9 & 10 Vict. c. 95, s. 141; Newton *v.* Nancarrow, 15 Q. B. 144.) And if a cause of action, where a tinner was party, arose *out* of the stannaries, it was always allowable to bring the action elsewhere. (4 Inst. 231; Com. Dig. Courts, L. 1.)

(*u*) 18 & 19 Vict. c. 32, s. 26. It forms, however, one of the provisions of the Judicature Act, 1873, that from the commencement of that Act on the 2nd of November, 1874, all the jurisdiction and powers of the court of the lord warden of the stannaries assisted by his assessors, shall be transferred to the court of appeal by that Act established (36 & 37 Vict. c. 66, s. 18). There is a further provision that her majesty may by order in council direct that all appeals hitherto heard by the *judicial committee* shall be referred for hearing to the same court (sect. 21); and that no appeal shall be brought from such court to the judicial committee (sect. 20).

(*x*) 3 Bl. Com. 84. The proceedings in the chancellor's court at *Oxford* (commonly called the vice-chancellor's court) used, in the time

learned bodies antient charters have been made, (confirmed by act of parliament,) committing to them, respectively, a jurisdiction, *inter alia*, in all personal actions to which any member or servant of the university is a party;—in every case at least where the cause of action arose within the liberties of the university, and where such member or servant was resident in the university when it arose, and when the action was brought (*y*).

[These privileges were granted, that the students might not be distracted from their studies by legal process from distant courts, and other forensic avocations (*z*). And the most antient charter containing this grant to the university of Oxford, was 28 Hen. III. A.D. 1244. And the same privileges were confirmed and enlarged by almost every succeeding prince, down to King Henry the eighth; in the fourteenth year of whose reign the largest and most extensive charter of all was granted.

of Blackstone, to conform to the civil law. It is now, however, provided by 25 & 26 Vict. c. 26, s. 12, that rules for its practice and forms of procedure may be made from time to time by the vice-chancellor of the university, with the approval of three of the judges of her Majesty's superior courts. In the chancellor's court at Cambridge, the civil law is still in use (vide sup. vol. I. p. 67).

(*y*) See 4 Inst. 227; Browne *v.* Renouard, 12 East, 12; Thornton *v.* Ford, 15 East, 634; Turner *v.* Bates, 10 Q. B. 292. This privilege, both as to Oxford and Cambridge, was, until recently, of an *exclusive* kind, the university being entitled, when an action under such circumstances was brought in any of the superior courts, to enter there a *claim of connusance;* by which it was withdrawn from that jurisdiction, and transferred to the court of the university. But as to Cambridge, this privilege is not now in every case exclusive. For by 19 & 20 Vict. c. xvii, intituled "An Act "to confirm an Award for the settlement of matters in difference "between the University and "Borough of Cambridge, and for "other purposes connected there-"with," it is provided by sect. 18, that "the right of the university, "or any member thereof, to claim "connusance of any action or cri-"minal proceeding wherein any "person shall be a party who is *not* "a member of the university, shall "cease and determine."

(*z*) It is remarked by Blackstone, (vol. iii. p. 84,) that "privileges of "this kind are of a very high anti-"quity, being generally enjoyed by "all foreign universities as well as "our own, in consequence of a con-"stitution of the Emperor Fre-"derick, A.D. 1158." (See Cod. 4, tit. 13.)

[One similar to which was afterwards granted to Cambridge in the third year of Queen Elizabeth. And later in the same reign an act of parliament was obtained, confirming *all* the charters of the two universities, and those of the 14 Hen. VIII. and 3 Eliz., by name (*a*). Which *blessed Act*, as Sir Edward Coke entitles it (*b*), established their privileges herein without any doubt or opposition.]

Besides the several inferior courts which have been already considered, and in which such injuries are redressed, as fall under the cognizance of common law or of equity, there still remain some others which give redress for no injuries at common law or equity, but for those of an ecclesiastical nature. These are properly distinguished by the title of Ecclesiastical Courts. [And we may properly begin with this remark that these eccentrical tribunals (which are principally guided by the rules of the imperial and canon laws), as they subsist and are admitted in England not by any right of their own, but upon bare sufferance and toleration from the municipal law, must have recourse to that law to be informed how far their jurisdiction extends, or what causes are permitted, and what forbidden, to be discussed or drawn in question before them (*c*). Except so far as this adoption by the municipal law extends, it matters not what the Pandects of Justinian or the Decretals of Gregory have ordained. They are here of no more intrinsic authority than the laws of Solon and Lycurgus. The law of England is the one uniform rule to determine the jurisdiction of our courts; and if any inferior tribunals whatsoever attempt to exceed the limits so prescribed them, the superior courts may, and do, prohibit them (*d*), and in some

(*a*) 13 Eliz. c. 29.
(*b*) 4 Inst. 227.
(*c*) Vide sup. vol. I. pp. 9, 61.
(*d*) As to prohibition to the Ecclesiastical Courts, see Ex parte Tucker, 1 Man. & Gr. 519; Tucker v. Inman, 4 Man. & Gr. 1049.

[cases punish their judges (*e*). With this general caution, we proceed now to consider—

IX. The Ecclesiastical Courts. Before we descend, however, to consider particular courts of this description, it must be premised in general, that in the time of our Saxon ancestors there was no sort of distinction between the lay and the ecclesiastical jurisdiction: the sheriff's county court was as much a spiritual as a temporal tribunal: the rights of the Church were ascertained and asserted at the same time, and by the same judges, as the rights of the laity. For this purpose the bishop of the diocese, and the alderman (or, in his absence, the sheriff) of the county, used to sit together in the county court, and had there the cognizance of all causes, as well ecclesiastical as civil; a superior deference being paid to the bishop's opinion in spiritual matters, and to that of the lay judges in temporal (*f*). This union of power was very advantageous to them both: the presence of the bishop added weight and reverence to the sheriff's proceedings; and the authority of the sheriff was equally useful to the bishop, by enforcing obedience to his decree on such refractory offenders as would otherwise have despised the thunder of mere ecclesiastical censures.

But so moderate and rational a plan was wholly inconsistent with those views of ambition, that were then forming by the court of Rome. It soon became an established maxim in the papal system of policy, that all ecclesiastical persons, and all ecclesiastical causes, should be solely and entirely subject to ecclesiastical jurisdiction only; which jurisdiction was supposed to be lodged in the first place and immediately in the Pope, by divine indefeasible right and investiture from our Saviour him-

(*e*) Hale, Hist. C. L. c. 2.

(*f*) "*Celeberrimo huic conventui episcopus et aldermannus intersunto; quorum alter jura divina, alter humana populum edoceto.*"—Wilk. Leg. Angl. Sax. LL. Eadg. c. 5.

[self; and derived from the Pope to all inferior tribunals (*g*).

It was not, however, till after the Norman conquest, that this doctrine was received in England; when William the Conqueror, (whose title was warmly espoused by the monasteries, which he liberally endowed, and by the foreign clergy, whom he brought over in shoals from France and Italy, and planted in the best preferments of the English Church,) was at length prevailed upon to establish this fatal encroachment, and separate the ecclesiastical court from the civil: whether actuated by principles of bigotry or by those of a more refined policy, in order to discountenance the laws of King Edward, abounding with the spirit of Saxon liberty, is not altogether certain. But the latter, if not the cause, was undoubtedly the consequence, of this separation: for the Saxon laws were soon overborne by the Norman justiciaries, when the county court fell into disregard by the bishop's withdrawing his presence; in obedience to the charter of the Conqueror, which prohibited any spiritual cause from being tried in the secular courts, and commanded the suitors to appear before the bishop only, whose decisions were directed to conform to the canon law (*h*).

King Henry the first, at his accession, among other restorations of the laws of King Edward the Confessor, revived this of the union of the civil and ecclesiastical courts; which was, according to Sir Edward Coke, only

(*g*) "Hence the canon lays it "down as a rule, that '*sacerdotes a* "*regibus honorandi sunt, non ju-* "*dicandi*' (Decret. part 2, caus. 11, "qu. 1, c. 41); and places an em- "phatical reliance on a fabulous "tale which it tells of the Emperor "Constantine; that when some "petitions were brought to him, "imploring the aid of his autho- "rity against certain of his bishops "accused of oppression and injus- "tice, he caused (says the holy "canon) the petitions to be burnt in "their presence, dismissing them "with this valediction; '*Ite et in-* "*ter vos causas vestras discutite,* "*quia dignum non est ut nos ju-* "*dicemus Deos.*'" (3 Bl. Com. p. 62.)

(*h*) Hale, Hist. C. L. 102; Selden in Eadm. p. 6, l. 24; 4 Inst. 259; Wilk. Leg. Angl. Sax. 292.

[a restitution, after the great heat of the conquest was past, of the antient law of England (*i*). This, however, was ill-relished by the popish clergy, who, under the guidance of that arrogant prelate Archbishop Anselm, very early disapproved of a measure that put them on a level with the profane laity, and subjected spiritual men and causes to the inspection of the secular magistrates; and therefore in their synod at Westminster, in the third year of Henry the first, they ordained that no bishop should attend the discussion of temporal causes; which soon dissolved this newly-effected union. And when, upon the death of King Henry the first, the usurper Stephen was brought in and supported by the clergy, we find one article of the oath which they imposed upon him was, that ecclesiastical persons and ecclesiastical causes should be subject only to the bishop's jurisdiction (*k*). And as it was about that time that the contest and emulation began between the laws of England and those of Rome (*l*), the temporal courts adhering to the former, and the spiritual adopting the latter as their rule of proceeding; this widened the breach between them, and made a coalition afterwards impracticable, which probably would else have been effected at the general reformation of the Church.]

Such was the formation of those separate and independent courts which have been since styled the ecclesiastical (or spiritual) courts, or the courts christian (*curiæ christianitatis*). The jurisdiction that they proceeded to exercise, was the administration of justice in all ecclesiastical matters in any way connected with the Church. In most of these, the connection is indeed a proper and obvious one; but there were others which, though also included in the ecclesiastical jurisdiction, had no such connection except in a forced and remote sense. We refer to the matters commonly designated as *testamentary* and *matri-*

(*i*) 2 Inst. 70.
(*k*) Spelm. Cod. 310.
(*l*) Vide sup. vol. I. p. 12.

monial; but by the Acts of 20 & 21 Vict. cc. 77 and 85 (*m*), the jurisdiction of the ecclesiastical courts over both of these matters, after an exercise of more than seven centuries, was withdrawn and transferred to courts of which we have had occasion to speak in former parts of this work (*n*). But it is now time to mention the various species of the ecclesiastical courts (*o*).

1. The Archdeacon's Court is the most inferior court in the whole ecclesiastical polity. It is held, in each archdeaconry, before a judge appointed by the archdeacon himself, and called his official. Its jurisdiction comprises ecclesiastical causes in general, arising within the archdeaconry: and, in ordinary cases, the party may commence his suit either in this court or the bishop's; though in some archdeaconries the suit must be commenced in the former, to the exclusion of the latter (*p*). From the archdeacon's court an appeal generally lies, by virtue of the statute 24 Hen. VIII. c. 12, to that of the bishop.

2. The Consistory Court of the bishop is held in the several cathedrals, for the trial of all ecclesiastical causes arising within the diocese (*q*). The chancellor of the diocese (or his commissary) is the judge; and from his sentence an appeal lies, by virtue of the same statute of

(*m*) The 20 & 21 Vict. c. 77 has been amended in certain particulars by 21 & 22 Vict. c. 95; and the 20 & 21 Vict. c. 85, by 21 & 22 Vict. c. 108, 22 & 23 Vict. c. 61, and 23 & 24 Vict. c. 144.

(*n*) Vide sup. vol. II. pp. 193, 279. One effect of this change has been to set aside altogether one of these ecclesiastical tribunals, viz. the *Prerogative Court;* which was, in each province, held before a judge appointed by the archbishop thereof, for administering justice in testamentary matters (viz. those relating to probate and administration), and in those only. Its jurisdiction arose in the case (an extremely frequent one) where the deceased left *bona notabilia* in different dioceses. As in this case the matter could not be disposed of in any single diocese, the archbishop claimed the jurisdiction by way of special *prerogative*. (Vide sup. vol. II. p. 192.)

(*o*) For further information as to these courts and the particular matters cognizable in them, see the Report of the Commissioners on Ecclesiastical Courts, dated 15th February, 1832.

(*p*) See Woodward *v.* Fox, 2 Vent. 267; Godolph. 61.

(*q*) Vide sup. vol. II. p. 672 (*e*).

Henry the eighth, to the archbishop of each province respectively.

3. The Court of Peculiars has a jurisdiction over all those parishes dispersed through the province of Canterbury in the midst of other dioceses, which are exempt from the Ordinary's jurisdiction, and subject to the Metropolitan only. All ecclesiastical causes arising within these peculiar or exempt jurisdictions (*r*) are originally cognizable by this court; which is indeed a branch only of the court next to be mentioned, viz.:—

4. The Court of Arches, which is a court of appeal belonging to the archbishop of Canterbury; and the judge thereof, (who sits as deputy to the archbishop,) is called the *Dean of the Arches*, because he antiently held his court in the church of St. Mary-*le-bow* (*Sancta Maria de arcubus*), though this court is now held at Westminster (*s*). And the office of Dean of the Arches having been for a long time united with that of the archbishop's principal official, he now, in right of the last-mentioned office (as doth also the official principal of the archbishop of York), receives and determines appeals from the sentences of all inferior ecclesiastical courts within the province. Many *original* suits, also, are brought before him, the cognizance of which properly belongs to inferior jurisdictions within the province, but in respect of which the inferior judge has waived his jurisdiction, under a certain form of proceeding known in the canon law by the denomination of *letters of request* (*t*).

(*r*) Such *benefices* as are "exempt or peculiar," are nevertheless (so far as the Act relative to pluralities and residence is concerned) subject to the jurisdiction of the archbishop or bishop within whose province or diocese they are locally situate. (See 1 & 2 Vict. c. 106, s. 108.)

(*s*) 3 Bl. Com. p. 65, where it is said, "the principal spiritual courts "are now holden at *Doctors Com-* "*mons*." This continued to be the case till after the changes introduced in the year 1857.

(*t*) See 2 Chit. Gen. Pract. 496; see Burgoyne *v.* Free, 2 Add. 406; Ex parte Denison, 4 Ell. & Bl. 292. It is to be observed that under the Church Discipline Act, 3 & 4 Vict.

The above are the ecclesiastical courts proper; but there is also to be considered the final Court of Appeal from the sentences of those courts (*u*). This, formerly, used to be the Court of Delegates,—*judices delegati*, appointed by commission under the Great Seal, and issuing out of Chancery, to represent the royal person and hear the appeal (*x*). This Court, in ordinary cases, consisted of three puisné judges, (one from each of the superior common law courts,) together with three or more civilians (*y*); and it was held by virtue of the statute 25 Hen. VIII. c. 19, which authorized all manner of appeals to be had and prosecuted from the archbishops' courts to the sovereign in chancery—the appeal prior to that statute having been to the Pope (*z*). [Appeals to Rome, indeed, were always looked upon by the English nation, even in the times of popery, with an evil eye, as being contrary to the liberty of the subject, the honour of the Crown, and the independence of the whole realm; and they were first introduced, in very turbulent times, in the sixteenth year of King Stephen (A.D. 1151), at the same period when (as Sir Henry Spelman observes), the civil and canon laws were first imported into England. But in a few years after, to obviate this growing practice, the Constitutions made at Clarendon in the eleventh year

c. 86 (as to which vide sup. vol. II. p. 672), no criminal proceeding against a clerk for an ecclesiastical offence shall be brought in any ecclesiastical court *otherwise* than by letters of request from the bishop to the Dean of Arches. (See Sheppard *v.* Bennett, Law Rep., 2 Adm. & Eccl. Ca. 335.)

(*u*) See 2 & 3 Will. 4, c. 92; 3 & 4 Will. 4, c. 41, s. 3; 6 & 7 Vict. c. 38; 7 & 8 Vict. c. 69, ss. 9, 12. It has been determined that the appeal from the archbishop's court, in a case where the crown is concerned (as well as in other cases), is to the Privy Council, and not to the upper house of convocation. (See Gorham *v.* Bishop of Exeter, 15 Q. B. 52.)

(*x*) 3 Bl. Com. 66.

(*y*) See Special Report on Ecclesiastical Courts, dated 25th January, 1831.

(*z*) A commission of *review* was sometimes granted to revise the sentence of the Court of Delegates in extraordinary cases; but, as a matter of right, no appeal lay from that court. (See 26 Hen. 8, c. 1; 1 Eliz. c. 1; 3 Bl. Com. 67.)

[of Henry the second, on account of the disturbances raised by Archbishop Becket and other zealots of the holy see, expressly declare, that appeals in causes ecclesiastical ought to lie from the archdeacon to the diocesan; from the diocesan to the archbishop of the province; and from the archbishop to the king; and are not to proceed any further without special licence from the Crown (*a*). But the unhappy advantage that was given, in the reigns of King John and his son Henry the third, to the encroaching power of the Pope, (who was ever vigilant to improve all opportunities of extending his jurisdiction hither,) at length riveted the custom of appealing to Rome in causes ecclesiastical so strongly that it never could be thoroughly broken off till the grand rupture happened in the reign of Henry the eighth; when all the jurisdiction usurped by the Pope in matters ecclesiastical was restored to the Crown, to which it originally belonged; so that the statute of the twenty-fifth year of Henry the eighth was but declaratory of the antient law of the realm (*b*).] The Court of Delegates, however, has been for some time superseded;—it having been provided by 2 & 3 Will. IV. c. 92, that every person who might formerly have appealed to it under 25 Hen. VIII. c. 19, must, for the future, appeal to her Majesty in council (*c*). And it was further enacted by 3 & 4 Will. IV. c. 41, s. 3, 6 & 7 Vict. c. 38, s. 11, and 7 & 8 Vict. c. 69, s. 9, that her Majesty by order in council might direct that all appeals from ecclesiastical courts should be referred to the *Judicial Committee* of the privy council (*d*).

(*a*) Cod. Vet. Leg. 315.

(*b*) 4 Inst. 341.

(*c*) See the Special Report of the Commissioners appointed to inquire into the Ecclesiastical Courts, dated 25th Jan. 1831, in which this change was recommended.

(*d*) As to this committee, vide sup. vol. II. p. 461. It forms, however, one of the provisions of the Judicature Act, 1873, that, on its coming into operation on 2nd November, 1874, her Majesty by order in council may direct that all appeals to the Judicial Committee shall be heard before the Court of Appeal established by that Act. But on hearing appeals in ecclesiastical

We now proceed to consider the wrongs or injuries which are cognizable in the different ecclesiastical courts (*e*). By which are to be understood only such as are made the subject of proceeding in these courts for the purpose of making an injured party satisfaction and redress for the damage which he has sustained; as we do not mean to take specific notice of any proceeding in the ecclesiastical courts for reformation of the offender, and *pro salute animæ* (*f*). And these injuries may be reduced under the following heads:—

[First, the *subtraction*, or withholding, *of tithes* from the rector or the vicar, whether the former be a clergy-

causes so referred (should such order issue), the Court of Appeal is to be assisted by certain of the archbishops and bishops as *assessors*. (36 & 37 Vict. c. 66, s. 21.)

(*e*) No notice has been taken in the text, of such courts as have only a *voluntary*, not a *contentious* jurisdiction; but are concerned merely in doing or settling what no one opposes (as granting dispensations, licences, faculties, and other remnants of the papal extortions), but do not concern themselves with administering redress for any injury. We may here remark, that Blackstone (vol. iii. p. 68) takes occasion to explain the rise and fall of the court of the king's *high commission* in causes ecclesiastical. He says, "This court was erected and united "to the regal power by virtue of "the statute 1 Eliz. c. 1, instead of "a larger jurisdiction which had "before been exercised under the "Pope's authority. It was intended "to vindicate the dignity and peace "of the Church, by reforming, "ordering and correcting the eccle-"siastical state and persons; and "all manner of errors, heresies, "schisms, abuses, offences, con-"tempts, and enormities. Under "the shelter of which very general "words, means were found, in that "and the two succeeding reigns, to "vest in the high commissioners "extraordinary and almost despotic "powers of fining and imprisoning: "which they exerted much beyond "the degree of the offence itself, "and frequently over offences by "no means of spiritual cognizance. "For these reasons this court was "justly abolished by statute 16 "Car. 1, c. 11."

(*f*) The offences proceeded against in the ecclesiastical courts *pro salute animæ*, are described in the Report of the Commissioners on those Courts, dated 15th July, 1832, as being those "committed by the "clergy themselves, such as neglect "of duty, immoral conduct, ad-"vancing doctrines not conformable "to the Articles of the Church, "suffering dilapidations, and the "like offences;—also by laymen, "such as brawling, laying violent "hands and other irreverent con-

[man or a lay appropriator (*g*). But herein a distinction must be taken: for the ecclesiastical courts have no jurisdiction to try the *right* of tithes, unless between spiritual persons (*h*); but in ordinary cases, between spiritual men and lay men, are only to compel the payment of them, when the right is not disputed (*i*). By the statute of *circumspectè agatis* (13 Edw. I. st. 4), it is declared, that the court christian shall not be prohibited from holding plea, "*si rector petat versus parochianos oblationes et decimas debitas et consuetas*" (*k*): so that if any dispute arises whether such tithes be *due* and *accustomed*, this cannot be determined in the ecclesiastical court, as such

" duct in the church or churchyard, " violating churchyards, neglecting " to repair ecclesiastical buildings, " incest, incontinence . . . These " offences are punished by monition, " penance, excommunication, sus- " pension *ab ingressu ecclesiæ*, sus- " pension from office, and deprivа- " tion." These courts formerly entertained also suits for *defamation*, in the case where the spiritual offence of incontinency was wrongfully imputed; but by 18 & 19 Vict. c. 41, their jurisdiction in this matter was abolished; and proceedings against *laymen* in the ecclesiastical courts for incontinency itself, have in modern times been out of use. Moreover, their jurisdiction to entertain suits for "brawling," against persons who are not in holy orders, was taken away by 23 & 24 Vict. c. 32, s. 1; and a remedy given for indecent behaviour in places of public worship, by way of summary conviction before two justices. We may further notice, that, subsequently to the date of the Report from which the above extract is taken, there was passed the 3 & 4 Vict. c. 86 ("for better enforcing Church discipline"), by which a particular method of preliminary investigation before commissioners, appointed by the bishop, was provided for the case of a *clerk in holy orders* charged with any offence against the laws ecclesiastical; or concerning whom there might exist scandal or evil report as having offended against such laws. (As to this Act, vide sup. vol. II. p. 672.)

(*g*) Stat. 32 Hen. 8, c. 7. As to tithes, vide sup. vol. II. p. 722.

(*h*) 2 Roll. Abr. 309, 310; Bro. Abr. tit. Jurisdiction, 85.

(*i*) 2 Inst. 364, 389, 490.

(*k*) Blackstone (vol. iii. p. 88) says that the 13 Edw. 1, st. 4, is rather a *writ* than a statute, and cites Barrington, 120; 3 Pryn. Rec. 336. It may be remarked that in Ruffhead's edition of the Statutes at Large it is stated, that the above proviso (though inserted in his text) is not in the original of the statute of *circumspectè agatis*. See the Revised Statutes, vol. I. p. 74, *in notis*.

[questions affect the temporal inheritance, and the determination must bind the real property. But where the *right* does not come into question, but only the *fact* whether or no the tithes allowed to be due are really subtracted or withdrawn, this is a transient personal injury for which the remedy (viz. the recovery of the tithes, or their equivalent) may properly be had in the spiritual court(*l*). However, in modern times, it has seldom happened that tithes have been sued for in the spiritual court; for if the defendant pleads any custom, *modus*, composition, or other matters whereby the right of tithing is called into question, this takes it out of the jurisdiction of the ecclesiastical judge; for the law will not suffer the existence of such a right to be decided by the sentence of any single—much less an ecclesiastical—judge, without the verdict of a jury.] Moreover, a summary method of recovering tithes not exceeding the value of 10*l.* (or, where due from Quakers, 50*l.*), was given by statute 53 Geo. III. c. 127, by complaint to two justices of the peace; and by 5 & 6 Will. IV. c. 74, and 4 & 5 Vict. c. 36, this proceeding before justices was made the *only* remedy to recover tithes not exceeding the above value, (no suit being allowed either in the civil or in the ecclesiastical courts,) unless the title to the tithes be *bonâ fide* brought into question,—in which case an action will lie in the temporal courts as before those statutes (*m*). Besides all which it is to be recollected that the claim itself to tithes has now become of rare occurrence—this species of property having been, in almost every parish, now commuted into a corn rent-charge under the Tithe Commutation Acts; and for the recovery of which, when in arrear, a special mode of proceeding by way of distress has been provided (*n*).

(*l*) See also 2 & 3 Edw. 6, c. 13, giving the tithe owner in some cases treble the value of the tithes subtracted, to be sued for in a court temporal, as to which see 2 Inst. 250; Graburn v. Brown, 16 Mee. & W. 821.

(*m*) See Peyton v. Watson, 3 Q. B. 658; Robinson v. Purday, 16 Mee. & W. 11.

(*n*) Vide sup. vol. II. pp. 731, 732.

[Another injury, cognizable in the spiritual courts, is the *nonpayment of ecclesiastical dues* to the clergy; such as pensions, mortuaries, compositions, offerings, and whatsoever falls under the denomination of *surplice-fees*, for ministerial offices of the Church: all which injuries are redressed by a decree for their actual payment. But the provisions of the statutes just mentioned with regard to the recovery of *tithes*, extend also to oblations and all other ecclesiastical dues and demands whatsoever (*b*).

These Courts also have cognizance of *spoliation*; which is an injury done by one clerk or incumbent to another, in taking the fruits of his benefice without any right thereunto, but under a pretended title. This injury is remedied by a decree to account for the profits so taken; and, when the *jus patronatûs* (or right of advowson) doth not come into debate, is cognizable in the spiritual court: as if a patron first presents A. to a benefice, who is instituted and inducted thereto: and then, upon pretence of a vacancy, *the same* patron presents B. to the same living, and he also obtains institution and induction. Now, if the fact of the vacancy be disputed, then that clerk who is kept out of the profits of the living, whichever it be, may sue the other in the spiritual court for spoliation, or taking the profits of his benefice. And it shall there be tried, whether the living were, or were not, vacant; upon which the validity of the second clerk's pretensions must depend (*c*). But if the right of patronage comes at all into dispute, as if one patron presented A. and another patron presented B., there the ecclesiastical court hath no cognizance, (provided the profits sued for amount to a fourth part of the value of the living,) but may be prohibited, at the instance of either patron, by the writ of *indicavit* (*d*). So, also, if a clerk, without any colour of title, ejects another from his parsonage, this injury must be redressed in the temporal courts; for it depends upon

(*b*) Vide sup. vol. II. p. 741.
(*c*) F. N. B. 36.
(*d*) See 13 Edw. 1, st. 4; Artic. Cleri, 9 Edw. 2, c. 2; F. N. B. 45.

[no question determinable by the spiritual law, (as plurality of benefices or no plurality, vacancy or no vacancy,) but is merely a civil injury (*e*).

Another case in which these courts have jurisdiction, is that of *dilapidations*, which (as elsewhere explained) are a kind of ecclesiastical waste (*f*). Such dilapidations may be either voluntary, by pulling down; or permissive, by suffering the chancel, parsonage-house, and other buildings thereunto belonging, to decay (*g*). And here an action lies either in the spiritual or in the temporal court (*h*): and it may be brought by the successor against the predecessor if living, or if dead, then against his executors.]

The spiritual courts have also cognizance as to *neglect in repairing the church, churchyard, and the like* (*i*); and until recently proceedings might, under certain circumstances, be brought therein for *nonpayment of a church-rate* (*k*). But by 53 Geo. III. c. 127, 5 & 6 Will. IV. c. 74, and 4 & 5 Vict. c. 36, where the rate was not disputed, and the amount demanded did not exceed 10*l.*, —or in the case of Quakers, 50*l.*,—the remedy was before the justices of the peace (*l*); and now by 31 & 32 Vict. c. 109, s. 1 (as explained in a former place), no suit or proceeding to compel the payment of a church-rate can be brought in any ecclesiastical or other court, or before any justice or magistrate (*m*).

Again, these courts have jurisdiction in all suits re-

(*e*) A clerk, refused admission by the bishop, may appeal to the archbishop by way of *duplex querela*. (See 1 Burn, 159.)

(*f*) As to ecclesiastical dilapidations, vide sup. vol. II. p. 713.

(*g*) See also 13 Eliz. c. 10, as to a spiritual person making over his goods with intent to defeat his successor of his remedy for dilapidations.

(*h*) Jones *v.* Hill, Cart. 224; S. C. 3 Lev. 268.

(*i*) Circumspectè agatis, 5 Rep. 66; and see the Report of Commissioners on Ecclesiastical Courts, dated 15th Feb. 1832, p. 51.

(*k*) 3 Bl. Com. p. 92.

(*l*) See Ex parte Mannering, 2 B. & Smith, 431; Pease *v.* Naylor, 3 B. & Smith, 620.

(*m*) Vide sup. vol. II. p. 698.

specting *pews and seats* in the body of the church (*r*); but where a pew is claimed by prescription, and the right is disputed, the temporal court will, by writ of prohibition, prevent the ecclesiastical court from proceeding farther; and this, in order that the claim by prescription may be determined by a jury.

We have now adverted to the principal injuries for which the party grieved, is entitled to find a remedy in the ecclesiastical courts. But before we entirely dismiss this head, it may not be improper to add a short account of the *method of proceeding* in these tribunals, with regard to the redress of injuries.

Their proceedings, then, are regulated according to the principles and practice of the civil and canon laws; or rather according to a mixture of both, corrected and new modelled by their own particular usages, and the interposition of the temporal courts (*s*). For if the proceedings in the spiritual court be ever so regularly consonant to the rules of the civil law, yet if they be manifestly repugnant to the fundamental maxims of our own law, (as if they require two witnesses to prove a fact, where one will suffice in a temporal court,) in such cases a prohibition will be awarded against them (*t*).

[The ordinary course of the procedure is, first,—by *citation*, to call the party injuring before them. Then by *libel* (*libellus*, a little book), or by articles drawn out in a formal *allegation*, to set forth the complainant's ground of complaint (*u*). To this succeeds the *defendant's answer* upon oath, when, if he denies or extenuates the charge, they proceed to *proofs* (*x*). If the defendant has any

(*r*) See the Report, cited sup. p. 313, n. (*i*), p. 49; Mainwaring *v.* Giles, 5 Barn. & Ald. 361, and Parker *v.* Leach, Law Rep., 1 P. C. 312. As to seats and pews in the *chancel*, vide sup. vol. II. p. 714.

(*s*) Vide sup. vol. I. pp. 65—67.

(*t*) 2 Roll. Abr. 300, 302. So, also, a prohibition will issue if they assume a jurisdiction which does not belong to them. See Tucker *v.* Inman, 4 Man. & Gr. 1049.

(*u*) See 3 & 4 Vict. c. 86, ss. 7, 8, and "Rules and Regulations, 1867."

(*x*) In former times, when a clergyman was cited to appear be-

[circumstances to offer in his defence, he must also propound them in what is called his *defensive allegation*, to which he is entitled in his turn to the *plaintiff's answer* upon oath, and may from thence proceed to *proofs* as well as his antagonist.] And by an enactment of 17 & 18 Vict. c. 47, the court may summon witnesses, and examine them, or cause them to be examined, by word of mouth, and that either before or after examination by deposition or affidavit (*y*); and notes of such evidence shall be taken down in writing by the judge, or registrar, or such other person and in such manner as the judge shall direct (*z*). [When all the pleadings and proofs are concluded, they are referred to the consideration of the judge, who *takes information* by hearing advocates on both sides, and thereupon forms his *interlocutory decree* or *definitive sentence* at his own discretion: from which there generally lies an *appeal* in the several stages already mentioned (*a*).]

The ecclesiastical courts have power to pronounce, among other sentences, that of *deprivation* (in the case of a suit against a beneficed incumbent), and also that of *excommunication;* such last sentence being pronounced as a spiritual censure for offences falling under ecclesiastical

fore the bishop or ecclesiastical court for alleged misconduct, he might be required to make answer to it, on the oath of himself and his compurgators; that is, a certain number of his neighbours able to swear that they believed him innocent of the charge. This oath, *ex officio*, (as it was called,) was prohibited generally to laymen (12 Rep. 26); but was continued, as regarded the clergy, till the middle of the seventeenth century, when it was abolished by 13 Car. 2, c. 12. (Report of Commissioners on Ecclesiastical Courts, 15 Feb. 1832, p. 55.)

(*y*) See also 3 & 4 Vict. c. 86, s. 17. As to the defendant himself being competent and compellable to give evidence, see Bishop of Norwich *v.* Pearse, Law Rep., 2 Adm. & Eccl. Ca. 281.

(*z*) It may be observed, that by 17 & 18 Vict. c. 125, ss. 20, 108, any person called as a witness, or required or desiring to make an affidavit or deposition, who shall refuse or be unwilling to be sworn from conscientious motives, may make *affirmation* instead. (As to the form of such affirmation, see 31 & 32 Vict. c. 72.)

(*a*) Vide sup. pp. 305, 306.

cognizance: and this is described in the books to be two-fold; the less and the greater. [The less excommunication is an ecclesiastical censure, excluding the party from the participation of the sacraments; the greater proceeds farther; and excludes him not only from these, but also from the company of all Christians (*b*). Formerly, too, and until the passing of the Act to be presently mentioned, an excommunicated man was disabled to do any act that was required to be done by a *probus et legalis homo.* He could not serve upon juries; could not be a witness in any court; and, what was worst of all, could not bring an action either real or personal, to recover lands or money due to him.] In this state of things it was the practice of the ecclesiastical courts to avail themselves of the weapon of excommunication, in order to enforce their sentences and orders in general. For where any of these were disobeyed, the court excommunicated the disobedient party; by which not only did he become subject to the consequences above described, but the general law of England stepped in besides to the court's assistance,—permitting the bishop to certify the contempt to the sovereign in Chancery, who issued thereon a writ, called, from the bishop's certificate, a *significavit,* or, from its effects, a writ *de excommunicato capiendo,* to the sheriff of the county,—under which he was to take the offender and imprison him in the county gaol until he was reconciled to the Church. But by 53 Geo. III. c. 127, it was provided, that no person excommunicated should incur by the sentence any penalty or incapacity whatever, save such imprisonment, not exceeding six months, as the ecclesiastical court should direct; and that such sentence should be signified to the sovereign in Chancery, and thereupon enforced by a writ *de excommunicato capiendo.* And, by the same Act, excommunication, as *for contempt,* was in effect abolished; and in lieu thereof it was provided that, where a lawful citation or sentence has not been obeyed, or where a contempt in face of the court has

(*b*) 3 Bl. Com. 101.

been committed, the judge shall have power to pronounce such persons "contumacious and in contempt;" and, after a certain period, to signify the same to the sovereign in Chancery: whereupon a writ *de contumace capiendo* shall issue (*c*); which shall have the same force and effect as formerly belonged, in case of contempt, to a writ *de excommunicato capiendo* (*d*).

(*c*) See R. *v.* Rickets, 6 A. & E. 537; R. *v.* Baines, 12 Ad. & E. 210; Adam *v.* Colthurst, Law Rep., 2 Adm. & Eccl. Ca. p. 40. By 2 & 3 Will. 4, c. 93, provisions are made for enforcing obedience to the decrees of the ecclesiastical courts of England and Ireland; and by 3 & 4 Vict. c. 93, and 23 & 24 Vict. c. 32, s. 1, further regulations are made for the release (in certain cases) of persons committed to gaol under the writ *de contumace capiendo*.

(*d*) There are certain other inferior courts besides those noticed in the text, which are now either expressly abolished or fallen into disuse. Of these we may notice:—1. *The Court of Great Sessions in Wales*, which was abolished by 11 Geo. 4 & 1 Will. 4, c. 70, and the Welsh judicature entirely incorporated with that of England:—2. The *Court of the Marshalsea*, which held plea of all trespasses committed within the verge of the court, where one of the parties was of the royal household; and of all debts and contracts, where both parties were of that establishment. This court was abolished by 12 & 13 Vict. c. 101, s. 13:—3. The *Palace Court* at Westminster, which held plea of all personal actions arising within twelve miles of the palace at Whitehall. This was also abolished by 12 & 13 Vict. c. 101, s. 13:—4. The Court of *Piedpoudre* (*curia pedis pulverizati*), so called from the dusty feet of the suitors frequenting the same, which is a court of record incident, as of common law, to every fair and market. Of this court the steward of the owner of the market is the judge, with power to administer justice for all commercial injuries in that very fair or market, and not in any preceding one (see 3 Bl. Com. pp. 33, 34; Bac. Ab. Court of Piepoudre; Com. Dig. Market, G.):—5. The *Forest Courts*, for the government of the royal forests in different parts of the kingdom, and for the punishment of all injuries done to the *venison* or deer, to the *vert* or greensward,—and to the *covert* in which the deer are lodged (see 3 Bl. Com. p. 71; Com. Dig. Chase, R. 1, 2; Bac. Ab. Courts, Courts of the Forest; R. *v.* Conyers, 8 Q. B. 981):—and, 6. The *Court of Policies of Assurance*, a court established by 43 Eliz. c. 12, and 13 & 14 Car. 2, c. 23, for determining in a summary way, under commission from the Lord Chancellor, all causes concerning policies of assurance in London. (See 3 Bl. Com. p. 75.) But questions concerning such policies are now always determined in the ordinary course of an action; and both the above statutes are now expressly repealed by 26 & 27 Vict. c. 125.

CHAPTER V.

OF THE SUPREME COURT OF JUDICATURE.

Of the inferior courts of justice sufficient has now been said, but it is time to present the reader with some account of a great measure of reform which has very recently been passed by the legislature in reference to the superior courts; and which is calculated to remove a variety of blots in our system of judicature. And under these new provisions, justice, hereafter, will be administered to the suitors in a *single* supreme court whether the appropriate remedy be such as has hitherto been sought from the Court fo Chancery, or from one of the superior courts of common law, or from the Court of Probate, or from the Court for Divorce and Matrimonial Causes, or from the Court of Admiralty, or from the London Court of Bankruptcy.

With regard to this important statute we may make this general and introductory remark—that its main design appears to be twofold: 1st, to create a tribunal which shall be formed out of materials supplied by the existing courts with as little change therein as is consistent with the object of administering in one or other of its divisions complete legal and equitable relief; and 2ndly, to entrust the judges of the tribunal thus constituted with the most ample powers of moulding by general rules the practice to be adopted, in such manner as shall secure the full attainment of the above object.

The Act itself, and the schedule of procedure thereto annexed, may be said to be complete in themselves so far as the constitution of the new court is concerned, and the

indication of the principles by which it is to be guided, but it is obvious that some time must elapse before the necessary alterations in practice can be elaborated. It is, however, satisfactory to reflect that this part of the scheme has been entrusted by the legislature to the wisdom and caution of the judges themselves, and that all cause for injudicious haste has been removed by enactments that where no special provision is contained in the Act, or in such rules or orders as shall be made pursuant thereto, the jurisdiction transferred to the new court shall be exercised, and all forms and methods of procedure hitherto in use shall continue to be used and practised, as nearly as may be, in the same manner as by the respective courts whose jurisdiction shall have been transferred (*a*); and further, that the existing rules in the Court of Probate, the Court for Divorce and Matrimonial Causes, the Admiralty Court, and the London Court of Bankruptcy, shall (until altered) remain in force in the new Supreme Court of Judicature (*b*). And these considerations, moreover, make it proper in this part of our work to enter into some matters (particularly with regard to the distinctions between actions) which will always be worth attention, in order the better to understand the changes which have been effected, though as the new system receives by degrees its full development they will perhaps become of somewhat less importance in the future.

With the objects thus above indicated, "The Supreme Court of Judicature Act, 1873" (36 & 37 Vict. c. 66), has been passed, and it is to commence and come into operation on the 2nd November, 1874 (*c*); and from such time the High Court of Chancery, the Court of Queen's Bench, the Court of Common Pleas, the Court of Exchequer, the High Court of Admiralty, the Court of Probate, the Court for Divorce and Matrimonial Causes

(*a*) 36 & 37 Vict. c. 66, ss. 28, 73.
(*b*) Sect. 70.
(*c*) Some few of its provisions took effect on the passing of the Act, viz. the 5th August, 1873.

and the London Court of Bankruptcy are united and consolidated together; and are made to constitute one supreme Court of Judicature in England, which shall administer both law and equity: so that if any plaintiff, petitioner or defendant shall advance an *equitable* claim or defence, such relief shall be given therein as heretofore by the Court of Chancery; and so that all *legal* claims, demands and liabilities existing by common law, custom or statute, shall be recognized and given effect to therein as heretofore by any of the courts whose jurisdiction is by that Act transferred to the High Court of Justice, as will be presently explained (*d*).

But before we proceed to treat of the constitution of the new court, and the divisions of which it is to consist, it will be necessary, in order to explain the alterations it is intended to work in our legal system, to give an account of each of the above courts out of which it is to be composed, concerning which we have not already spoken in other parts of this work. And we shall commence with—

I. [The High Court of Chancery. This, in matters of civil property, has always been deemed the most important of any of the superior courts of justice. It has its name of chancery, *cancellaria*, from the judge who presides here, the Lord Chancellor, or *cancellarius*; who, Sir Edward Coke tells us, is so termed *a cancellando*, from cancelling the king's letters-patent when granted contrary to law, which is the highest point of his jurisdiction (*e*). But the office and name of chancellor (however derived) was certainly known to the Courts of the Roman emperors: where it originally seems to have signified a chief scribe or secretary, who was afterwards invested with several judicial powers, and a general superintendence over the rest of the officers of the prince. From the Roman empire it passed

(*d*) 36 & 37 Vict. c. 66, ss. 16, 24, et vide post, p. 346.

(*e*) 4 Inst. 88.

[to the Roman church, ever emulous of imperial state; and hence every bishop has to this day his chancellor, the principal judge of his consistory. And when the modern kingdoms of Europe were established upon the ruins of the empire, almost every state preserved its chancellor; with different jurisdictions and dignities, according to their different constitutions. But in all of them he seems to have had the supervision of all charters, letters and such other public instruments of the crown as were authenticated in the most solemn manner: and therefore, when seals came in use, he had always the custody of the sovereign's great seal. So that the office of chancellor, or lord keeper, (whose authority, by statute 5 Eliz. c. 18, is declared to be exactly the same,) is with us at this day created by the mere delivery of the Great Seal into his custody (*f*); whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom; and superior, in point of precedency, (if of the peerage,) to every temporal lord (*g*).] His salary is 10,000*l.* per annum (*h*). [He is a privy councillor by his office (*i*); and, according to Lord Chancellor Ellesmere, prolocutor (or speaker) of the House of Lords by prescription (*k*). To him, (under the crown,) belongs the appointment of all justices of the peace throughout the kingdom (*l*). Being formerly usually an ecclesiastic, and presiding over the royal chapel, he became keeper of the king's conscience; visitor, in right of the king, of all hospitals and colleges of royal founda-

(*f*) Lamb. Archeion, 65; 1 Roll. Abr. 885.

(*g*) Stat. 31 Hen. 8, c. 10, ss. 4, 8. See the Table of Precedence, sup. vol. II. p. 615, n., where it is stated (on the authority of Blackstone) that the Lord Chancellor comes immediately after the Archbishop of Canterbury.

(*h*) 14 & 15 Vict. c. 82, s. 17; 15 & 16 Vict. c. 87, s. 16. And see 36 & 37 Vict. c. 66, s. 13.

(*i*) Selden, Office of Lord Chancellor, sect. 8.

(*k*) Of the Office of Lord Chancellor, edit. 1561.

(*l*) In the case of magistrates for the county he usually makes these appointments on the nomination of the lord lieutenant (vide sup. vol. II. pp. 585, 586).

[tion; and patron of all the king's livings of the value of 20*l.* per annum or under, in the king's books (*m*). He is also the general guardian of all infants, idiots and lunatics; and has the general superintendence of all charitable uses in the kingdom. And all this, over and above the jurisdiction which he has exercised in the Court of Chancery.

The chief province of the High Court of Chancery is to administer that large portion of our law which is distinguished from the common law, by the term *equity* (*n*). This distinction between law and equity, as administered in different courts (*o*), seems never to have obtained in

(*m*) Madox, Hist. of Exchequer, 42. This limit is stated by Blackstone (vol. iii. p. 48) as "under the value of twenty marks;" and he cites 38 Edw. 3; 3 F. N. B. 35. But, according to Mr. Christian, (who cites Gibs. 764, and 1 Burn's Ecc. Law, 129,) since the new valuation of benefices in the time of Henry the eighth, it has been considered as 20*l.* per annum or under, probably on the ground that the twenty marks temp. Edward the third were equivalent to 20*l.* temp. Henry the eighth. And see Lord Chancellor's case, Hobart, 214. As to the *sale* of certain livings the patronage whereof is vested in the lord chancellor for the time being under 26 & 27 Vict. c. 120, vide sup. vol. II. p. 739.

(*n*) Vide sup. vol. I. p. 80. The Court of Chancery, however, it is to be observed, consists of *two distinct tribunals*, one being the court of equity described in the text, and the other a court of *common law*, out of which have issued all the original writs passing under the Great Seal, and all commissions of sewers, lunacy, and the like—some of these writs being originally kept in a *hamper* (whence the "hanaper office," as to which see 5 & 6 Vict. c. 103), and others in a little sack or bag (whence the "petty bag office," as to which see Baddeley *v.* Denton, 1 L. M. & P. 172; Still *v.* Booth, ibid. 440). And as to writs thus issuing out of the common law division of the Court of Chancery, see 12 & 13 Vict. c. 109. In addition to thus keeping the *officina justitiæ*, the common law Court of Chancery has also a jurisdiction to hold plea upon a *scire facias* to cancel letters-patent, and to hold plea of petitions, *monstrans de droit*, traverses of office, and the like. But suits on the common law side have been rare. Blackstone observing (vol. iii. p. 49) that he had met with no proceeding in error from it since the year 1572. By 12 & 13 Vict. c. 109, it was provided that issues arising in proceedings therein might be sent to one of the superior courts of common law to be there determined.

(*o*) This anomaly of administering equity and law in distinct courts, is however approved by Lord Bacon. (See De Aug. Scient. lib. viii. ch. 3, app. 45.)

[any other country; and yet the difference of one from the other, when administered by the same tribunal, was perfectly familiar to the Romans; the *jus prætorium*, or discretion of the prætor, being distinct from the *leges*, or standing laws (*p*); but the power of both centred in one and the same magistrate, who was equally intrusted to pronounce the rule of law, and to apply it to particular cases, by the principles of equity. With us, too, the *aula regia*, which was the supreme court of judicature under the Conqueror, undoubtedly administered equal justice according to the rules of both or either, as the case might chance to require: and, when that tribunal was broken to pieces, the idea of a court of equity, as distinguished from a court of law, did not subsist in the original plan of partition. For though equity is mentioned by Bracton (*q*), as a thing contrasted to strict law, yet neither in that writer, nor in Glanvil or Fleta, nor yet in Britton, (composed under the auspices and in the name of Edward the first, and treating particularly of courts and their several jurisdictions,) is there a syllable to be found relating to the equitable jurisdiction to the Court of Chancery. Nor is it very clear in what manner or under what circumstances that anomaly was first established in this country (*r*). But it was probably the result of the rude and imperfect constitution of our courts of the common law, which derived their authority in each case from the king's *original writ*, issued at the commencement of the suit, in some fixed and antient form,—so that they found, or supposed, themselves unable to afford any remedy beyond what the writ

(*p*) Thus Cicero: "*jam illis promissis non esse standum, quis non videt, quæ coactus quis metu et deceptus dolo promiserit? Quæ quidem pleraque jure prætorio liberantur, nonnulla legibus.*"—Offic. l. i. x.

(*q*) L. ii. c. 7, fol. 23; also f. 3 a, a. 5; see Plowd. 467.

(*r*) Some interesting information as to the early history of the Court of Chancery and the growth of its jurisdiction, will be found in the Introduction to Lord Campbell's Lives of the Chancellors; and in Spence on the Equitable Jurisdiction of the Court.

[so issued specifically required or authorized. For it seems that, owing to this cause, there was a frequent failure of justice in the common law courts: and that, under such circumstances, the application for redress used to be to the king in person, assisted by his privy council,—from whence also arose the jurisdiction of the Court of Requests, which was virtually abolished by the statute 16 Car. I. c. 10: and they were wont to refer the matter either to the chancellor and a select committee, or, by degrees, to the chancellor only; who mitigated the severity or supplied the defects of the judgments pronounced in the courts of law, upon weighing the circumstances of the case.

In these early times the chief judicial employment of the chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases where none was before administered. And to quicken the diligence of the clerks in the Chancery, who were too much attached to antient precedent, it was provided by statute of Westminster the second, (13 Edw. I. c. 24,) that "whensoever from thenceforth in one case a "writ shall be found in the Chancery, and in a like case, "falling under the same right and requiring the like "remedy, no precedent of a writ can be produced, the "clerks in Chancery shall agree in forming a new one: "and if they cannot agree, it shall be adjourned to the "next parliament, where a writ shall be framed by con-"sent of the learned in the law (*t*), lest it happen for "the future, that the court of our lord the king be defi-"cient in doing justice to the suitors." And this accounts for the very great variety of writs of trespass *on the case*, to be met with in the register; whereby the suitor had ready relief, according to the exigency of his business, and adapted to the specialty, reason, and equity of his very case (*u*). Which provision (with a little accuracy

(*t*) A great variety of new precedents of writs, in cases before unprovided for, are given by this very statute of Westminster the second.

(*u*) Lamb. Archeion, 61.

[in the clerks of the Chancery, and a little liberality in the judges, by extending rather than narrowing the remedial effects of the writ,) might have effectually answered all the purposes of a court of equity; except that of obtaining a discovery by the oath of the defendant (*v*).

But when, about the end of the reign of King Edward the third, uses of land were introduced (*x*),—and, (though totally discountenanced by the courts of common law,) were considered as fiduciary deposits, and binding in conscience, by the clergy,—the separate jurisdiction of the Chancery, as a court of equity, began to be established (*y*); and John Waltham, who was bishop of Salisbury and chancellor to King Richard the second, (by a strained interpretation of the above-mentioned statute of Westminster the second,) devised a writ of *subpœna*, returnable to the Court of Chancery only, to make the feoffee to uses accountable to his *cestui que use;* which process was afterwards extended to other matters wholly determinable at the common law, upon false and fictitious suggestions; for which, therefore, the chancellor himself was, by statute 17 Rich. II. c. 6, directed to give damages to the party unjustly aggrieved. But, as the clergy, so early as the reign of King Stephen, had attempted to turn their ecclesiastical courts into courts of equity, by entertaining suits *pro lœsione fidei*, as a spiritual offence against conscience, in case of nonpayment of debts or any breach of civil contracts (*z*); till checked by the Constitutions of Clarendon (*a*), which declared that, "*placita de debitis, quæ fide interposita debentur,*

(*v*) Blackstone (vol. iii. p. 52) remarks that this was also the opinion of Fairfax, a very learned judge in the time of Edward the fourth, who says, "*Le subpœna ne serroit my "cy soventement use come il est "ore, si nous attendomus tiels "actions sur les cases, et main- "teinomus le jurisdiction de ceo "court, et d'auter courts.*"—(Year B. 21 Edw. 4, 23.)

(*x*) Vide sup. vol. I. p. 358.

(*y*) Spelm. Gloss. 106; R. *v.* Standish, 1 Lev. 242.

(*z*) Lord Lyttelt. Hen. 2, Book 3, p. 361, note.

(*a*) 10 Hen. 2, c. 15; Speed. 468.

[*vel absque interpositione fidei, sint in justitiâ regis:*"— therefore probably the ecclesiastical chancellors, who then held the seals, were remiss in abridging their own new-acquired jurisdiction; especially as the spiritual courts continued (*b*) to grasp at the same authority as before, in suits *pro læsione fidei*, so late as the fifteenth century (*c*), till finally prohibited by the unanimous concurrence of all the judges. However, it appears from the parliament rolls (*d*), that in the reigns of Henry the fourth and fifth, the commons were repeatedly urgent to have the writ of *subpœna* entirely suppressed, as being a novelty devised by the subtlety of Chancellor Waltham, against the form of the common law; whereby no plea could be determined, unless by examination and oath of the parties, according to the form of the law civil, and the law of holy church, in subversion of the common law. But though Henry the fourth, being then hardly warm in his throne, gave a palliating answer to their petitions, and actually passed the statute, 4 Henry IV. c. 23, whereby judgments at law are declared irrevocable unless by attaint or writ of error, yet his son put a negative at once upon the whole application: and in Edward the sixth's time, the process by bill and *subpœna* was become the daily practice of the court (*e*).

(*b*) In the fourth year of Henry the third, suits in courts christian, *pro læsione fidei* upon temporal contracts, were adjudged to be contrary to law. (Fitzh. Abr. tit. Prohibition, 15.) But in the statute or writ of *circumspectè agatis*, said to have issued in the thirteenth year of Edward the first, suits *pro læsione fidei* were allowed to the ecclesiastical courts; according to some antient copies, (Berthelet, Stat. Antiq. Lond. 1531, 90 *b*; 3 Pryn. Rec. 336,) and the common English translation of that statute; though in Lyndewood's copy, (Prov. l. 2, t. 2,) and in the Cotton MS. (Claud. D. 2), that clause is omitted.

(*c*) Year Book, 2 Hen. 4, 10; 11 Hen. 4, 88; 38 Hen. 4, 29; 20 Edw. 4, 10.

(*d*) Rot. Par. 4 Hen. 4, Nos. 78 and 110; 3 Hen. 5, No. 46, cited in Prynne's Abr. of Cotton's Records, 410, 422, 424, 548; 4 Inst. 83; 1 Roll. Abr. 370, 371, 372.

(*e*) Rot. Parl. 14 Edw. 4, No. 33 (not 14 Edw. 3, as cited 1 Roll. Abr. 370, &c.)

[But this did not extend very far: for in the antient treatise, entitled *Diversité des Courtes* (*f*), supposed to be written very early in the sixteenth century, we have a catalogue of the matters of conscience then cognizable by *subpœna* in Chancery, which fall within a very narrow compass. No regular judicial system at that time prevailed in the court; but the suitor, when he thought himself aggrieved, found a desultory and uncertain remedy, according to the private opinion of the Chancellor, who was generally an ecclesiastic, or sometimes (though rarely) a statesman; no lawyer having sat in the Court of Chancery from the times of the Chief Justices Thorpe and Knyvet, successively chancellors to King Edward the third in 1372 and 1373 (*g*), to the promotion of Sir Thomas More by King Henry the eighth, in 1530. After which the Great Seal was indiscriminately committed to the custody of lawyers, or courtiers (*h*), or churchmen (*i*), according as the convenience of the times and the disposition of the prince required, till Serjeant Puckering was made lord keeper in 1592: from which time to the present, the office of Lord Chancellor has always been filled by a lawyer, excepting the interval from 1621 to 1625, when the seal was intrusted to Dr. Williams, then Dean of Westminster, but afterwards bishop of Lincoln; who had been chaplain to Lord Ellesmere, when chancellor (*k*).

In the time of Lord Ellesmere (A.D. 1616) arose that notable dispute between the courts of law and equity, set on foot by Sir Edward Coke, then chief justice of the Court of King's Bench; whether a court of equity could give relief after or against a judgment at the common law. This contest was so warmly carried on, that indictments were preferred against the suitors, the solicitors,

(*f*) Tit. Chancery, fol. 296, Rastell's edit. A.D. 1534.

(*g*) Spelm. Gloss. 111; Dugd. Chron. Ser. 50.

(*h*) Wriothesley, St. John, and Hatton.

(*i*) Goodrick, Gardner, and Heath.

(*k*) Biog. Brit. 4278.

[the counsel, and even a master in chancery, for having incurred a *præmunire*, by questioning, in a court of equity, a judgment in the Court of King's Bench, obtained by gross fraud and imposition (*l*). This matter being brought before the king, was by him referred to his learned counsel for their advice and opinion; who reported so strongly in favour of the courts of equity (*m*), that his majesty gave judgment on their behalf: but, not contented with the irrefragable reasons and precedents produced by his counsel, (for the chief justice was clearly in the wrong,) he chose rather to decide the question by referring it to the plenitude of his royal prerogative. Sir Edward Coke submitted to the decision (*n*), and thereby made atonement for his error: but this struggle, together with the business of *commendams*—in which he acted a very noble part (*o*),—and his controlling the commissioners of sewers, were the open and avowed causes, first of his suspension, and soon after of his removal, from his office (*p*).

Lord Bacon, who succeeded Lord Ellesmere, reduced the practice of the court into a more regular system; but did not sit long enough to effect any considerable revo-

(*l*) Bacon's Works, iv. 611, 612, 632.

(*m*) Whitelocke of Parl. ii. 390; 1 Chan. Rep. Append. 11.

(*n*) See the entry in the Council Book, 26th July, 1616 (Biogr. Brit. 1390).

(*o*) In a cause of the Bishop of Winchester, touching a *commendam*, King James, conceiving that the matter affected his prerogative, sent letters to the judges not to proceed in it till himself had been first consulted. The twelve judges joined in a memorial to his majesty, declaring that their compliance would be contrary to their oaths and the law; but upon being brought before the king and council, they all retracted and promised obedience in every such case for the future; except Sir Edward Coke, who said, "that when the case happened, he "would do his duty."—(Biogr. Brit. 1388.)

(*p*) See Lord Ellesmere's speech to Sir Henry Montague, the new chief justice, 15th November, 1616. (Moor's Reports, 828.) However, Sir Edward might probably have retained his seat, if, during his suspension, he would have complimented Lord Villiers, with the disposal of the most lucrative office in his court. (See Biogr. Brit. 1391.)

[lution in the science itself: and few of his decrees which have reached us are of any great consequence to posterity. His successors, in the reign of Charles the first, did little to improve upon his plan: and even after the Restoration, the seal was committed to the Earl of Clarendon, who had withdrawn from practice as a lawyer nearly twenty years; and afterwards to the Earl of Shaftesbury, who, (though a lawyer by education,) had never practised at all. Sir Heneage Finch, who succeeded, in 1673, and became afterwards Earl of Nottingham, was a person of the greatest abilities and most uncorrupted integrity; a thorough master and zealous defender of the laws and constitution of his country; and endued with a pervading genius, that enabled him to discover and to pursue the true spirit of justice, notwithstanding the embarrassments raised by the narrow and technical notions which then prevailed in the courts of law, and the imperfect ideas of redress which had possessed the courts of equity. The reason and necessities of mankind, arising from the great change in property by the extension of trade and the abolition of military tenures, co-operated in establishing his plan, and enabled him in the course of nine years to build a system of jurisprudence and jurisdiction upon wide and rational foundations: which have also been extended and improved by many great men, who have since presided in Chancery. And from that time to this, the power and business of the court have increased to an amazing degree (*q*).

(*q*) In recent times, a great variety of enactments have been passed for the improvement of the Court of Chancery in reference chiefly to the following subjects:—*Abolition of offices*, 2 & 3 Will. 4, c. 111; 5 & 6 Vict. c. 103; *Administration of oaths*, 11 & 12 Vict. c. 10; 16 & 17 Vict. c. 78; *Chamber business*, 30 & 31 Vict. c. 87; *Common law side*, 12 & 13 Vict. c. 109; *Judges of appeal*, 14 & 15 Vict. c. 83; 30 & 31 Vict. c. 64; 31 & 32 Vict. c. 11; *Office of examiner*, 16 & 17 Vict. c. 22; *Persons in contempt and pauper defendants*, 23 & 24 Vict. c. 149; 27 & 28 Vict. c. 15; *Pleading, practice, and procedure*, 3 & 4 Vict. c. 94; 4 & 5 Vict. c. 52; 5 Vict. c. 5; 8 & 9 Vict. c. 105; 13 & 14 Vict. c. 35; 15 & 16 Vict. c. 86; 17 & 18 Vict.

[The judicial duties of this court of equity have been long shared in some measure by an officer of high rank, called the Master of the Rolls, originally appointed only for the superintendence of the writs and records appertaining to its common law department (*r*), but accustomed also to sit on the equity side as a separate, though subordinate judge (*s*). Concerning his authority to hear and determine causes, and his general power in the Court of Chancery, there were formerly divers questions and disputes very warmly agitated; to quiet which, it was declared by 3 Geo. II. c. 30, that all orders and decrees by him made, except such as by the course of the court were appropriated to the Great Seal alone, should be deemed to be valid, subject nevertheless to be discharged or altered by the Lord Chancellor (*t*).] And by a modern enactment, 3 & 4 Will. IV. c. 94, s. 24, the Master of the Rolls (subject to the same qualification) was specially directed to hear motions, pleas and demurrers, as well as causes generally, which should be set down for hearing before him. The vast increase of business, however, to which reference has been already made, having at length become such as to render the antient force of the Court of Chancery wholly inadequate to the labours it had to perform, it was found necessary, in the year

c. 100; 18 & 19 Vict. c. 134; 21 & 22 Vict. c. 27; 25 & 26 Vict. c. 42; *Relief of suitors*, 15 & 16 Vict. c. 87; 16 & 17 Vict. c. 98; *Service of process*, 2 Will. 4, c. 33; *Vice-chancellors*, 5 Vict. c. 5, s. 19; 14 & 15 Vict. c. 4; 15 & 16 Vict. c. 80, ss. 52—58; *Suitors' fee fund*, 32 & 33 Vict. c. 91, ss. 4—8.

(*r*) 4 Inst. 82.

(*s*) The Master of the Rolls was at one time the chief of a body of officers of the court (with certain judicial as well as administrative powers) called the *Masters in Chancery*, among whom was included the *accountant-general*. This last-mentioned office was abolished by 35 & 36 Vict. c. 44, and the other Masters in Chancery by 15 & 16 Vict. c. 80, s. 59, with certain temporary reservations (as to which see 17 & 18 Vict. c. 100; 23 & 24 Vict. c. 149, s. 1).

(*t*) 3 Bl. Com. 450. See 7 Will. 4 & 1 Vict. c. 46, and 36 & 37 Vict. c. 66, s. 13, as to the salary of the Master of the Rolls. See also 1 & 2 Vict. c. 94, vesting in him the custody of all the public records.

1813, to appoint another assistant to the Lord Chancellor in his judicial functions, under the title of Vice-Chancellor of England (*u*); and after the transfer to the Court of Chancery, in the year 1841, of the equity business of the Exchequer, two more Vice-Chancellors were added to its judicial list (*v*); each of them sitting, (like the Master of the Rolls,) separately from the Lord Chancellor. A further addition was afterwards made of two judges called the Lords Justices of the *Court of Appeal* in Chancery (*x*); and this Court of Appeal has consisted of the Lord Chancellor together with these judges, possessing all the jurisdiction exercised by the Lord Chancellor himself, so far as his judicial business in Chancery is concerned, without prejudice, however, to his right to sit, as formerly, alone. And from this Court an ultimate appeal has hitherto been allowed to the House of Lords (*y*).

II. [The Court of Queen's Bench (*z*)—so called because the sovereign used formerly to sit there in person (*a*)—the style of the court still being *coram ipsâ reginâ*,—is the supreme court of common law in the kingdom. Yet, though the sovereign himself used to sit in this court, and still is supposed so to do, he did not, neither by law is he empowered to, determine any cause or motion but by the mouth of his judges, to whom he has committed his whole judicial authority (*b*).

(*u*) See 53 Geo. 3, c. 24.

(*v*) See 5 Vict. c. 5, s. 19; 14 & 15 Vict. c. 4; and 15 & 16 Vict. c. 80, ss. 52 – 58.

(*x*) See 14 & 15 Vict. c. 83, and 30 & 31 Vict. c. 64.

(*y*) Under "The Judicature Act, 1873," after the commencement of that Act on the 2nd November, 1874, the appeal from the Chancery division of the High Court of Justice will be to the Court of Appeal by that Act established, and to no other tribunal.

(*z*) This court is called the King's Bench in the reign of a king; and during the protectorate of Cromwell it was styled the Upper Bench. The Bail Court (a branch of the court) was constituted under 11 Geo. 4 & 1 Will. 4, c. 70, s. 1.

(*a*) 4 Inst. 73.

(*b*) The king used to decide causes in person, in the *Aula Regia*. "*In curiâ domini regis ipse in propriâ jura decernit.*"—(Dial. de Scacch. l. i. s. 4.) And James the first is said to have sat in the King's

[This court is not, nor can be, from the very nature and constitution of it, fixed to any certain place, but may follow the sovereign's person wherever he goes; for which reason all process issuing out of this court in the sovereign's name is returnable *ubicunque fuerimus in Angliâ*. It hath, indeed, for some centuries past, usually sat at Westminster, being an antient palace of the crown; but might remove with the sovereign to York or Exeter, if he thought proper to command it. And we find that, after Edward the first had conquered Scotland, it actually sat at Roxburgh (*a*). And it is, moreover, especially provided in the *Articuli super Chartas*, that the king's chancellor, and the justices of his bench, shall follow him, so that he may have at all times near unto him some that be learned in the laws (*b*).

The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject, by speedy and summary interposition. It takes cognizance both of criminal and civil causes; the former in what is called the crown side or crown office (*c*); the latter in the plea side of the court (*d*). The jurisdiction of the crown side it is not our present business to consider;—that will be more properly discussed in the sixth and concluding Book.] But on the plea side, or civil

Bench in person, but to have been informed by his judges that he could not deliver an opinion.

(*a*) M. 20, 21 Edw. 1; Hale, Hist. C. L. 200.

(*b*) 28 Edw. 1, c. 5.

(*c*) See 6 & 7 Vict. c. 20, for abolishing certain offices on the crown side of the Queen's Bench, and regulating the crown office. This Act was amended by 23 & 24 Vict. c. 54.

(*d*) See 6 Geo. 4, c. 82, to abolish the sale of offices in the Court of King's Bench, &c.

branch, it enjoys, (though originally by usurpation,) a general jurisdiction and cognizance over all actions between subject and subject, those of the real class only excepted (*e*). It does not meddle, however, with matters affecting the revenue of the crown.

From the judgments of this court proceedings by way of error or on appeal have hitherto been taken, ultimately, to the House of Lords; but firstly to the Court of *Exchequer Chamber*, which was originally constituted as a court of error by 31 Edw. III. c. 12, but afterwards remodelled in consequence of the recommendations of a royal commission, issued in 1828, by the 11 Geo. IV. & 1 Will. IV. c. 70, s. 8: and, according to the arrangement then provided, the judgments of each of the superior courts of common law were made subject to revision by the judges of the other two, sitting collectively for that purpose; and the composition of the court consequently admits of three different combinations, consisting of any two of the courts below, viz., those which were not parties to the judgment supposed to be erroneous (*f*).

III. The Court of Common Pleas—or, as it is some-

(*e*) The usurpation of the Queen's Bench originated as follows:—The jurisdiction of this court in civil actions was formerly confined to actions of trespass, or other injury alleged to be committed *vi et armis*. But this court might always have held plea of *any* civil action (other than actions real),—provided the defendant was an officer of the court, or in the custody of the marshal, that is, of the prison keeper of the court. To make this privilege available against *any* defendant, the fiction was invented of surmising, that the defendant had committed a breach of the peace in Middlesex or any other county in which the court sat, and in which it was consequently held to possess an extraordinary criminal jurisdiction; and by aid of this false suggestion, a writ, called a bill of Middlesex, or a writ of *latitat* founded on a bill of Middlesex (as the case might be), was issued against him; by virtue of which he was supposed to be committed to the custody of the marshal, so as to bring him within the jurisdiction of the court as to any personal action.

(*f*) As the transfer of the appellate jurisdiction of the House of Lords and of the Court of Exchequer Chamber to the Court of Appeal constituted by the Judicature Act, 1873, vide post, p. 356.

times technically called, the Court of Common Bench—takes cognizance of all actions between subject and subject, without exception; including formerly the extensive class of real actions, of which it still retains the surviving species, viz. actions for dower and *quare impedit* (*c*). And over real actions, (which formerly excelled all others in importance,) it has always exercised an *exclusive* jurisdiction; as it did also over fines and recoveries, while these modes of assurance existed, and still does, over the forms of conveyance now substituted for them. Hence it has always been considered as the principal seat of learning relative to ordinary actions between man and man, and is styled by Lord Coke, the lock and key of the common law (*d*). This court, also, has no authority in matters relating to the revenue; but, on the other hand, it has been in modern times entrusted by the legislature with an exclusive jurisdiction in appeals from the decisions of the revising barristers, and in some other matters (*e*). Thus it is to this court that acknowledgments are to be made under the Fine and Recovery Act (*f*); that petitions against elections or returns are to be presented under the "Parliamentary Elections Act, 1868" (*g*); and to which the barristers appointed to try the validity of elections under the "Corrupt Practices (Municipal Elections) Act, 1872," have to make their report (*h*).

From the judgments of this court, proceedings in error or by way of appeal have hitherto been taken first to the Court of Exchequer Chamber and ultimately to the House of Lords (*i*).

IV. [The Court of Exchequer,—the origin of which is as follows:—By the antient Saxon constitution there was only one superior court of justice in the kingdom; and that court had cognizance both of civil and spiritual

(*c*) See 23 & 24 Vict. c. 126, s. 26.
(*d*) 4 Inst. 99.
(*e*) Vide sup. vol. II. p. 378.
(*f*) Vide sup. vol. I. p. 584.
(*g*) 31 & 32 Vict. c. 125.
(*h*) 35 & 36 Vict. c. 60.
(*i*) Vide sup. p. 333, n. (*f*).

[causes; viz., the *wittenagemote* or general council, which assembled annually, or oftener, wherever the king kept his Christmas, Easter or Whitsuntide, as well to do private justice as to consult upon public business. At the Conquest the ecclesiastical jurisdiction was diverted into another channel: and the Conqueror, fearing danger from these annual parliaments, contrived also to separate their ministerial power, as judges, from their deliberative, as counsellors to the crown. He therefore established a constant court in his own hall, thence called by Bracton, and other antient authors, *aula regia* or *aula regis* (*k*). This court was composed of the king's great officers of state resident in his palace, and usually attendant on his person: such as the lord high constable and lord mareschal, who chiefly presided in matters of honour and of arms; determining according to the law military and the law of nations (*l*). Besides these, there were the lord high

(*k*) Lib. 3, tr. 1, c. 7. See also 3 Turn. Hist. Ang. Sax. p. 177.

(*l*) Notice may be here taken of the antient and long disused *court of chivalry* (or court *military*), which used to be held before the lord high constable and earl marshal of England. It was not a court of record, but had a jurisdiction criminal as well as civil,—relating, in the former case, to deeds of arms and war, and, in the latter, to the redressing of injuries of honour, and of encroachments in matters of coat-armour, precedency, and other distinctions of families. As a court of honour, it gave satisfaction by ordering reparation in point of honour, as, for instance, to compel the defendant *mendacium sibi ipsi imponere*—to take the lie that he has given upon himself—or make such other submission as the laws of honour may require; but the case must have been such that no relief could be had by action in a court of common law; and it could give no pecuniary satisfaction or damages. As to encroachments and usurpations in heraldry and coat-armour, it was its business, (according to Sir Matthew Hale,) to adjust the right of armorial ensigns, bearings, crests, supporters, pennons, &c., and also rights of place and precedence, subject to any royal patent or act of parliament; but the marshalling of coat-armour, which was formerly the pride and study of all the best families in the kingdom, becoming greatly disregarded, fell into the hands of certain officers and attendants upon this court called *heralds*, whose testimony as to descent is no longer of the same weight as formerly, nor even in general admissible in a court of justice. Yet their original visi-

[steward and lord great chamberlain; the steward of the household; the lord chancellor, whose peculiar business it was to keep the king's seal, and examine all such writs, grants and letters as were to pass under that authority; and the lord high treasurer, who was the principal adviser in all matters relating to the revenue. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices; and by the greater barons of parliament, all of whom had a seat in the *aula regia*, and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. All these, in their several departments, transacted all secular business, both criminal and civil, and likewise the matters of the revenue; and over all presided one special magistrate, called the chief justiciar, or *capitalis justiciarius totius Angliæ;* who was also the principal minister of state, the second man in the kingdom, and, by virtue of his office, guardian of the realm in the king's absence. And this officer it was who principally determined all the vast variety of causes that arose in this extensive jurisdiction; and, from the plenitude of his power, grew at length both obnoxious to the people and dangerous to the government which employed him (*m*).

This great universal court being bound to follow the

tation books, compiled when progresses were solemnly and regularly made into every part of the kingdom to inquire into the state of families, and to register such marriages and descents as were verified to the heralds upon oath, are still allowed to be good evidence of pedigree. (See Matthews *v.* Port, Comb. 63; Taylor on Evidence, 2nd ed. p. 1358.) The proceedings in the court of chivalry were by petition in a summary way; and the trial was not by jury, but by witnesses, or by combat, modes of trial, of which an account will be found hereafter; and there was an appeal to the sovereign in person. (As to the court of chivalry, see also Bl. Com. vol. iii. p. 68; vol. iv. p. 267; 13 Ric. 2, c. 2; Com. Dig. Courts; Bac. Ab. Courts; Parker's case, 1 Lev. 230; Show. Parl. Ca. 60; 4 Inst. 125. As to the office of earl marshal, see the Posthumous Discourse of Camden on that subject.)

(*m*) Spelm. Gl. 331, 332, 333; Gilb. Hist. C. P. Introd. 17.

[king's household in all his progresses and expeditions, the trial of common causes therein was found very burthensome to the subject. Wherefore King John, who dreaded also the power of the justiciar, very readily consented to that article which now forms the eleventh chapter of Magna Charta, and enacts, that "*communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo*" (*n*). This certain place was established in Westminster Hall, the place where the *aula regis* originally sat, when the king resided in that city; and there it hath ever since continued. And the court being thus rendered fixed and stationary, the judge became so too, and a chief, with other justices, of the Common Pleas, was thereupon appointed; with jurisdiction to hear and determine all pleas of land, and injuries merely civil between subject and subject. Which critical establishment of this principal court of common law, at that particular juncture and that particular place, gave rise (as formerly explained) to the inns of court in its neighbourhood; and, thereby collecting together the whole body of the common lawyers, enabled the law itself to withstand the attacks of the canonists and civilians, who laboured to extirpate and destroy it.

The *aula regia* being thus stripped of so considerable a branch of its jurisdiction, and the power of the chief justiciar being also considerably curbed by many articles in the great charter, the authority of both began to

(*n*) Vide sup. vol. I. p. 16. "This "precedent" (says Blackstone, vol. iii. p. 39) "was soon after copied by "King Philip the Fair, in France, "who about the year 1302 fixed the "parliament of Paris to abide con- "stantly in that metropolis; which "before used to follow the person "of the king wherever he went, "and in which he himself used fre- "quently to decide the causes that "were then depending; but all were "then referred to the sole cogni- "zance of the parliament and its "learned judges. (Mod. Un. Hist. "xxiii. 396.) And thus also, in "1495, the Emperor Maximilian "the first, fixed the imperial cham- "ber (which before always travelled "with the court and household) to "be constantly held at Worms, from "whence it was afterwards trans- "lated to Spire." (Mod. Un. Hist. xxix. 467.)

[decline apace under the long and troublesome reign of King Henry the third. And in further pursuance of this example, the other several offices of the chief justiciar were, under Edward the first (who new modelled the whole frame of our judicial polity) subdivided and broken into distinct courts of judicature. The high steward, with the barons of parliament, formed an august tribunal for the trial of delinquent peers; and the barons reserved to themselves in parliament the right of reviewing the sentences of other courts in the last resort. The distribution of common justice between man and man was thrown into so provident an order, that the great judicial officers were made to form a check upon each other: the Court of Chancery issuing all original writs under the great seal to the other courts: the Exchequer managing the king's revenue; the Common Pleas being allowed to determine all causes between private subjects; and the Court of King's Bench retaining all the jurisdiction which was not cantoned out to other courts, and particularly the sole cognizance of pleas of the crown, or criminal causes (*o*).]

The Court of Exchequer, then, (to which our attention is at present particularly directed,) was at first intended principally to order the revenues of the crown, and to recover the king's debts and duties (*p*); though it afterwards acquired by usurpation (*q*) the additional

(*o*) The King's Bench had also assigned to it the superintendence of both the other superior courts: as, after judgment given by either of these, it was to the King's Bench that recourse was to be had to correct any error *in law* that might be found in the proceedings. And this superiority it continued to retain until modern times; but by 11 Geo. 4 & 1 Will. 4, c. 70, s. 8, errors in the judgments of the Common Pleas, Exchequer, as well as those in the King's Bench itself, were directed to be redressed in a court of separate jurisdiction, viz., the Court of Exchequer Chamber. (Vide sup. p. 333.)

(*p*) 4 Inst. 103—116; see Attorney-General *v.* Sewell, 4 Mee. & W. 77.

(*q*) The nature of this usurpation was as follows:—By the original constitution of this court, to which it was incident, (as stated in the text,) to call the king's farmers and

character of an ordinary court of justice between subject and subject. It is called the Exchequer (*Scaccarium*), from the chequed cloth, resembling a chess-board, which covered the table there, and on which, when certain of the king's accounts were made up, the sums were marked and scored with counters (*r*). And it consists of two divisions, the *Receipt* of the Exchequer, which manages the royal revenue (*s*), and the *Court*, or *judicial* part of it, with which alone we are at present concerned.

This court was, from the time of the separation of the Exchequer from the *aula regia* down to modern times, subdivided into a court of equity and a court of common law (*t*). But by statute 5 Vict. c. 5, all the jurisdiction of the Court of Exchequer as a court of equity, or otherwise than as a court of law or of revenue was transferred to the Court of Chancery (*u*). The Court of Exchequer

debtors to account, such parties as these were privileged in their turn to sue and implead all manner of persons in the same court that they were themselves thus called into. For this purpose they resorted to a writ called a *quo minus*, in which the plaintiff suggested that he was the king's farmer or debtor, and that the defendant had done him the injury or damage complained of, *quo minus sufficiens existit*, by which he is the less able to pay the king his debt or rent. Afterwards, and by gradual connivance, this surmise of being debtor to the king was allowed to be inserted by persons who did not really stand in that capacity; and came to be considered as mere words of course, so as to open the court to all the nation equally. The same fiction was permitted on the equity side of the court; where any person might file a bill against another upon a bare suggestion that he was the king's accountant,—a suggestion which was never controverted. This usurpation, as well as the analogous one in the Queen's Bench, (to be hereafter noticed,) long since ripened into an indefeasible and unquestionable title. And at length, by 2 Will. 4, c. 39, the writ of *quo minus* was abolished; and a new method substituted, giving a direct and proper jurisdiction to this court.

(*r*) 3 Bl. Com. p. 44.

(*s*) As to the receipt of the Exchequer, vide sup. vol. II. p. 528.

(*t*) See 3 Bl. Com. 45.

(*u*) As to the equitable jurisdiction of the Exchequer sitting as a court of *revenue* since this statute, see Attorney-General *v.* Hallett, 15 Mee. & W. 687. By 5 & 6 Vict. c. 86, certain offices on the revenue side are abolished; and the business theretofore transacted therein is transferred to *her majesty's remembrancer in the Exchequer*. See also 22 & 23 Vict. c. 21, regulating

at present, therefore, consists of a *revenue* side and of a common law or *plea* side (*u*). In the capacity of a court of law on the revenue side, it ascertains and enforces, by proceedings appropriate to the case, the proprietary rights of the crown against the subjects of the realm (*x*): in the capacity of a court of common law on the plea side, it administers redress between subject and subject in all actions personal, though not in the real actions which still remain, viz., *dower* and *quare impedit.*

From the judgments of this court, proceedings in error or by way of appeal have hitherto been taken first to the Court of Exchequer Chamber and ultimately to the House of Lords (*y*).

The three courts last enumerated, when mentioned collectively, have been usually described as the "superior courts of the common law:" or when taken in connection with the Court of Chancery, as "the superior courts" generally, or as the "Courts at Westminster." Their judges are also often popularly called, by way of pre-eminence, the *Judges of the Land,* or simply the *Judges;* and they are of high dignity and precedence,—taking rank before baronets, and being the constitutional advisers of the House of Lords on matters of law (*z*). The number of them has varied considerably at different periods of our legal history (*a*). In modern times, indeed, it remained fixed for a long period at twelve; but in consequence of the increase of business, an additional judge was appointed,

the office of Queen's remembrancer, and amending the practice and procedure on the revenue side of the Court of Exchequer, and 24 & 25 Vict. c. 92. Under these last Acts "general rules" were issued, which will be found printed in the 6th volume of the Exchequer Reports. See also 7 H. & N. 505.

(*u*) For regulations of the officers of this court on the plea side, see 2 & 3 Will. 4, c. 110.

(*x*) As to the procedure and practice in crown suits in the Exchequer, see 28 & 29 Vict. c. 104, under which Act general rules were issued in E. T. 1866. (See Law Rep., 1 Ex. 389.)

(*y*) Vide sup. p. 333, n (*f*).

(*z*) See the Table of Precedence, sup. vol. II. p. 615, n.

(*a*) Dugd. Orig. Jurid. c. 18.

about the beginning of the reign of Will. IV., to each of the three courts (*b*); and by 31 & 32 Vict. c. 125, a similar increase to their number was authorized in reference to the jurisdiction conferred upon them by that statute in the trial of election petitions (*c*). And it may be remarked that, previously to this last alteration, it was provided by 30 & 31 Vict. c. 68, that certain parts of the business of the courts which used to be disposed of by the judges sitting in chambers, might be dealt with (in the first instance, and subject to an appeal to a judge) by the *Masters* of the courts under general rules issued for that purpose (*d*). The judges are all created by letters-patent; and by 12 & 13 Will. III. c. 2, and 1 Geo. III. c. 23, they were made irremovable, except upon address of both houses of parliament. It may be noticed, that the title of the Chief Judge of the Queen's Bench is "the Lord Chief Justice of England," and that his salary is 8,000*l.* a-year, and the Lord Chief Justice of the Common Pleas and the Lord Chief Baron of the Exchequer have each a salary of 7,000*l.* a-year. The other judges have a uniform salary of 5,000*l.* a-year (*e*).

V. The High Court of Admiralty (another court the jurisdiction whereof is transferred to the High Court of Justice, established by "The Judicature Act, 1873"), has

(*b*) See stat. 11 Geo. 4 & 1 Will. 4, c. 70, ss. 1, 2.

(*c*) See 31 & 32 Vict. c. 125, s. 11.

(*d*) As to the Masters of the courts, see 7 Will. 4 & 1 Vict. c. 30. It may be observed here that the jurisdiction assigned to the masters extends in general to all *chamber* business except in matters relating to the liberty of the subject. But certain matters are excluded; such as criminal proceedings, removal of causes, prohibitions and injunctions, compulsory references, interpleaders, discovery, reviewing taxation, staying proceedings after verdict, taking acknowledgments of married women, giving leave to sue *in formâ pauperis*, and making charging orders.

(*e*) 2 & 3 Will. 4, c. 116; 14 & 15 Vict. c. 41; 36 & 37 Vict. c. 66. No substantial alteration in the position of the judges, in most of the particulars mentioned in the text, is made by the Judicature Act, 1873, in reference to the future judges of the High Court of Justice and Court of Appeal established by that Act.

jurisdiction and power to try and determine all *maritime* causes, that is, such injuries as are committed on the high seas (*f*); and generally speaking, and with the exception of any case otherwise provided for by act of parliament, all admiralty causes must be causes arising wholly upon the sea, and not within the precincts of any county. [For the statute 13 Ric. II. c. 5, directs that the admiral and his deputy shall not meddle with any thing, but only things done upon the sea: and the statute 15 Ric. II. c. 3, declares that the court of the admiral hath no manner of cognizance of any contract or of any thing done within the body of any county, either by land or by water (*g*); nor of any wreck of the sea, for that must be cast on land before it becomes a wreck (*h*). But it is otherwise of things *flotsam*, *jetsam*, and *ligan*; for over them the Admiralty Court has jurisdiction, as they are in and upon the sea. If part of any contract (or other cause of action) doth arise upon the sea, and part upon the land, the common law excludes the Admiralty Court from its jurisdiction; for, part belonging properly to one cognizance, and part to another, the common or general law takes place of the particular (*i*). Therefore, though pure maritime acquisitions, which are earned and become due on the high seas —as seamen's wages—are one proper object of the admi-

(*f*) We may remark here that it forms one of the provisions of the Judicature Act, 1873, that in any cause or proceeding for damages arising between two ships, if both ships shall be found to have been in fault, the rules hitherto in force in the Court of Admiralty, so far as they have been at variance with the rules in force in the common law, shall prevail. (36 & 37 Vict. c. 66, s. 25.)

(*g*) As to what is *infra corpus comitatûs*, see Com. Dig. Admiralty (E. 14); Jac. Law Dict. "Admiral."

(*h*) It is provided, however, by the statute 17 & 18 Vict. c. 104, ss. 460, 464, 468, 476, 492—498, that the Court of Admiralty shall, in certain cases, have jurisdiction on claims of *salvage;* and by sect. 476, that such jurisdiction shall attach, whether the salvage service was performed at sea, or by land, or partly at sea and partly by land. Salvage and wreck have been already treated of in this work. (Vide vol. II. pp. 18, 539, 544.)

(*i*) Co. Litt. 261.

[ralty jurisdiction, even though the contract for them be made upon land (*k*); yet, in general, if there be a contract made in England, and to be executed upon the seas—as a charter-party or covenant that a ship shall sail to Jamaica, or shall be in such a latitude by such a day; or a contract made upon the sea to be performed in England,—as a bond made on shipboard to pay money in London, or the like; these kinds of mixed contracts belong not to the admiralty jurisdiction, but to the courts of common law (*l*). It is to be observed, however, that where the Admiralty Court hath jurisdiction of the original subject-matter in the cause, it hath also jurisdiction of all consequential questions, though properly determinable at common law (*m*). Wherefore, among other reasons, a suit for beaconage of a beacon standing on a rock in the sea, may be brought in the Court of Admiralty; the admiral having an original jurisdiction over beacons (*n*).]

In addition to his general jurisdiction over maritime causes, the judge of the Admiralty holds a special commission to adjudicate on *prize of war* (*o*); and moreover has to decide on *booty of war*, (i. e. prize on shore,) when specially referred to him by the Crown (*p*).

The High Court of Admiralty adopts many of the principles of the civil law, and also makes use of other laws, as occasion requires; such as the Rhodian laws, and the laws of Oleron—bodies of law derived from places antiently celebrated for their skill in naval affairs, viz. the island of Rhodes in the Mediterranean, and the island of

(*k*) 1 Ventr. 146. But as to claims for wages, vide sup. p. 291.

(*l*) See Bridgeman's case, Hob. 23; Hale, Hist. C. L. 35; Le Caux *v.* Eden, Doug. 572.

(*m*) 13 Rep. 53; Ridley *v.* Eglesfield, 2 Lev. 25; Hardr. 183.

(*n*) Crosse *v.* Digges, 1 Sid. 158.

(*o*) 2 Chit. Gen. Pr. 538 a; 1 Doug. 594; Lindo *v.* Rodney, 2 Doug. 613, n; Mitchell *v.* Rodney (in error), 2 Bro. P. C. 423; Faith *v.* Pearson, 6 Taunt. 439.

(*p*) 3 & 4 Vict. c. 65, s. 22. The wide and interesting subject of "booty of war" (which can be barely referred to in a work of the present kind) will be found thoroughly discussed in the recent case of "the Banda and Kirwee Booty," reported Law Rep., 1 Ad. & Ecc. pp. 109—269.

Oleron in France (*q*). Formerly, the proceedings in the Court of Admiralty were conducted exclusively by advocates and proctors, but by 22 & 23 Vict. c. 6, serjeants, barristers, attornies and solicitors, were also empowered to practise therein.

Such in a general point of view is the nature of the High Court of Admiralty (*r*); but it will be proper here to advert to some specific regulations which have been recently introduced in reference to its proceedings, by certain Acts of recent date.

Thus, 1. Whenever any ship shall be under arrest by process issuing from the High Court of Admiralty,—or the proceeds of any ship having been so arrested shall have been brought into the Registry of the same court (*s*),—the court shall have jurisdiction to take cognizance of all claims and causes of action of any person in respect of any mortgage of such ship; and to decide any suit instituted by any such person, in respect of any such claims or causes of action respectively (*t*).

2. That in all suits the court may summon before it and examine witnesses by word of mouth; and either before or after examination by deposition, or before a commissioner appointed by the court: and notes of such evidence shall be taken down by the judge or registrar or such other person as the court may direct (*u*).

3. That in case of claim against any ship, freight, goods or other effects whatsoever, the plaintiff may proceed by way of *monition*, without proceeding to arrest the subject-matter of the suit; and, on proof of the personal service of the citation, the court may proceed to hear the cause and make due order therein (*v*).

(*q*) Hale, Hist. C. L. 36; Co. Litt. 11.

(*r*) As to the *criminal* jurisdiction of the Admiralty Court, vide post, vol. IV. p. 311.

(*s*) See 33 & 34 Vict. c. 45, establishing a district registry at Liverpool.

(*t*) 3 & 4 Vict. c. 65; and see 24 & 25 Vict. c. 10, s. 11.

(*u*) As to the practice with respect to interrogatories, see 24 & 25 Vict. c. 10, s. 17, and "The May," Law Rep., 2 Adm. & Ecc. 319.

(*v*) 17 & 18 Vict. c. 78, s. 13.

4. That, whenever any of her Majesty's ships of war shall attack persons alleged to be *pirates* afloat or ashore, —the High Court of Admiralty, or any court of Vice-Admiralty in her Majesty's dominions beyond the seas, may determine whether such was the real character of the persons attacked:—that all ships and goods taken from pirates by such ships, or officers and crews, may be proceeded against in any of such courts, and be liable to condemnation as droits and perquisites of her Majesty in her office of Admiralty;—but that if any part of the property shall be duly proved to have been taken from her Majesty's subjects, or the subjects of any foreign power, the same shall be restored to the former owner, on paying, in lieu of salvage, a sum of money equal to one-eighth part of the true value, to be distributed among the recaptors as the Act directs (*x*).

From the sentence of the admiralty judge, an *appeal*, at one time, used to lie in general to the Court of Delegates; and from certain of the "vice-admiralty courts" (that is to say, courts with an admiralty jurisdiction established in her Majesty's possessions beyond the seas), appeals might be brought either before the Court of Admiralty in England, or the sovereign in council (*y*). [But in case of prize vessels taken in time of war in any part of the world, and condemned in any courts of admiralty and vice-admiralty as lawful prize, the appeal lay to certain commissioners, consisting chiefly of the privy council, and called lords commissioners in prize cases. And this by virtue of divers treaties with foreign nations, by which

(*x*) 13 & 14 Vict. c. 26. Besides the above Acts, there are also the following:—3 & 4 Vict. c. 66, to regulate the salaries of the officers of the High Court of Admiralty; 17 & 18 Vict. c. 19, as to its jurisdiction in cases of prize and salvage; c. 104, ss. 1, 460, 464, 476, 486, 498, as to its jurisdiction in salvage; 24 & 25 Vict. c. 10, as to its jurisdiction in cases of damage, and questions between co-owners of ships and claims for wages, &c. (see La Blache *v.* Rangel, Law Rep., 2 P. C. Ca. 38; The Mary Ann, ib., 1 Adm. & Ecc. 8); 31 & 32 Vict. c. 78, as to proceedings by the admiralty in reference to naval stores, &c.

(*y*) 3 Bl. Com. 69.

[particular courts are established in all the maritime countries of Europe, for the decision of this question, "whether lawful prize or not?" for this being a question between subjects of different states, it belongs entirely to the law of nations, and not to the municipal laws of either country to determine it.] However, by 2 & 3 Will. IV. c. 92, the appellate jurisdiction of the delegates was transferred to the sovereign in council. And by 3 & 4 Will. IV. c. 41, s. 2, all appeals whatever in prize suits, and other proceedings in the admiralty or vice-admiralty courts, or any other court abroad, which might then be made either to the High Court of Admiralty or to the lords commissioners in prize cases, were directed in future to be made to the sovereign in council. And by the statute last named, and by 6 & 7 Vict. c. 38, and 7 & 8 Vict. c. 69, the Privy Council was empowered to refer all such appeals to the Judicial Committee (*y*).

VI. Of the three other courts which are to be consolidated into the Supreme Court of Judicature, namely, the Court of *Probate*, the Court of *Divorce and Matrimonial Causes*, and the *London Court of Bankruptcy*, it will be sufficient here barely to make mention, as we have already given, in the course of our second volume, such account of their constitution and course of proceeding as the nature of this work requires (*z*).

Such being the materials out of which the new Supreme Court of Judicature is to be composed, it is next to be understood that the court itself is to consist of two permanent divisions, viz.: I. Her Majesty's High Court of Justice: and II. Her Majesty's Court of Appeal. And of these in their order.

(*y*) By the Judicature Act, 1873, all jurisdiction of her Majesty in council or of the Judicial Committee, upon appeal from the High Court of Admiralty, is transferred to the Court of Appeal by that Act established (36 & 37 Vict. c. 66, s. 18).

(*z*) Vide sup. vol. II. pp. 147, 185, 239.

I. *The High Court of Justice.* Of this court the first judges are to be the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, the several Vice-Chancellors, the judge of the Court of Probate, and of the Court for Divorce and Matrimonial Causes, the several puisné justices of the Queen's Bench and Common Pleas respectively, the junior barons of the Exchequer, and the judge of the Court of Admiralty, except such of the aforesaid judges as shall be appointed ordinary judges of the Court of Appeal, and the Lord Chief Justice of England is to be president of the court in the absence of the Lord Chancellor (*a*).

The High Court of Justice is constituted a superior court of record, and to it is transferred and vested the jurisdiction which at the commencement of the Act belonged to any of the eight courts of which we have already spoken in this chapter; as well as that which then belonged to the Palatinate Courts at Lancaster and Durham; and also to the courts created by commissions of assize of oyer and terminer, or any of such commissions. And of the palatinate and of the assize courts some account may be here desirable.

In the counties palatine of Lancaster and Durham there have been courts of law and equity held before the respective chancellors of those counties, or other judges commissioned for that purpose (*b*). Of the counties palatine

(*a*) 36 & 37 Vict. c. 66, s. 5. It is intended, however, that the permanent number of judges of the High Court shall not exceed *twenty-one*. (Ibid.)

(*b*) 4 Inst. 213, 218; Finch R. 452. It may be noticed that there were formerly other courts of a nature analogous to those of the counties palatine, viz., the courts of the *cinque ports;* but the jurisdiction of these courts in relation to civil suits and proceedings was taken away by 18 & 19 Vict. c. 48, ss. 1, 2, amended by 20 & 21 Vict. c. 1. Blackstone notices also (vol. iii. p. 78) the *Court of the Duchy Chamber of Lancaster*, with a concurrent jurisdiction with Chancery as to matters in equity relating to lands holden of the Crown in right of the duchy (Owen *v.* Holt, Hob.

themselves we have spoken in a former place (*b*); but, for our present purpose, it is proper further to remark that the courts therein were formerly exempt from the ordinary process of the courts at Westminster. [For as originally all *jura regalia* were granted to the courts of these counties palatine they had, of course, the sole administration of justice by their own judges appointed by themselves and not by the crown. It would, therefore, have been incongruous for the king to send his writ to direct the judge of another's court in what manner to administer justice between the suitors.] And even after these franchises were re-united to the crown, yet still the maxim continued to prevail, that the ordinary writs ran not into a county palatine; and, therefore (until a recent period), all process issuing out of the superior courts at Westminster, and intended to be executed in one of these counties, used to be directed in the first instance to the chancellor thereof, who thereupon issued his mandate to the sheriff. And the judges of assize who go circuit thereon have hitherto sat by virtue of a special commission from the crown, as owner of the franchise and under the seal thereof; and not by the usual commission under the Great Seal of England. But it forms one of the provisions of the Judicature Act, 1873, that after the commencement of that Act on the 2nd November, 1874, the counties palatine of Lancaster and Durham shall respectively cease to be counties palatine so far as respects the issue of commissions of assize or other like commissions, but not further or otherwise (*c*); and that all such commissions may be issued for the trial of all causes and matters within such counties

77; Fisher *v.* Patten, 2 Ley, 74); which, as he remarks, is a thing very distinct from the county palatine of Lancaster, inasmuch as it includes much territory at a distance from the county palatine, and particularly a very large district surrounded by the city of Westminster. It may also be remarked here, that in certain mining districts belonging to the duchy of Lancaster, there are courts called the *Barmote* Courts for regulation of the mines, and for deciding questions of title and other matters relating thereto. See as to these courts, 14 & 15 Vict. c. 94.

(*b*) Vide sup. vol. I. pp. 129—133.

(*c*) See 36 & 37 Vict. c. 66, s. 99.

respectively in the same manner in all respects as in any other counties of England and Wales (*d*); and that there should be transferred to the High Court of Justice established by that Act all the jurisdiction which at the commencement thereof was vested in or capable of being exercised by the Court of Common Pleas at Lancaster, or the Court of Pleas at Durham (*e*).

With respect to the courts of assize, it is to be observed that these are composed of two or more commissioners called judges of assize, or of assize and nisi prius, who are sent by special commission from the crown on *circuits* all round the kingdom, to try, by a jury of the respective counties, the truth of such matters of fact as are then under dispute in the courts of Westminster Hall;—there being, however, as to London and Middlesex, this exception, that instead of their being comprised within any circuit, courts of *nisi prius* are held there for the same purpose, in and after every term, before the chief or other judge of the superior courts, at what are called the London and Westminster *sittings* (*f*). [These judges of assize came into use in the room of the antient justices in eyre, *justiciarii in itinere*; who were regularly established, if not first appointed, by the Parliament of Northampton, A.D. 1176, in the twenty-second year of Henry the second, with a delegated power from the king's great court or *aula regia*, being looked upon as members thereof (*g*): and they afterwards made their circuit round the kingdom, once in seven years, for the purpose of trying causes (*h*). They

(*d*) 36 & 37 Vict. c. 66, s. 99.

(*e*) Sect. 16. The original jurisdiction of the *chancery* court of the county palatine of Lancaster (as to which see 13 & 14 Vict. c. 43) does not seem to be affected by this Act.

(*f*) The times for these sittings are at present fixed under 17 & 18 Vict. c. 125, s. 2 ("The Common Law Procedure Act, 1854").

(*g*) Sold. Jan. l. 2, s. 5; Spelm. Cod. 329.

(*h*) Co. Litt. 293.—"*Anno* 1261, *justiciarii itinerantes venerunt apud Wigorniam in octavis S. Johannis baptistæ;—et totus comitatus eos admittere recusavit, quod*

[were afterwards directed by *Magna Charta*, c. 12, to be sent into every county once a year to take (or receive the verdict of the jurors or recognitors in certain actions, then called) recognitions or assizes; the most difficult of which they are directed to adjourn into the Court of Common Pleas to be there determined. The itinerant justices were sometimes mere justices of assize, or of dower, or of gaol delivery, and the like; and they had sometimes a more general commission, to determine all manner of causes, being constituted *justiciarii ad omnia placita* (*i*); but the present justices of assize and *nisi prius*, are more immediately derived from the statute of Westminster the second, (13 Edw. I. c. 30,) and consist principally of the judges of the superior courts of common law, to whom the duty is confided of thus superintending the trial of matters of fact, at the courts of assizes and *nisi prius*,—as well as that of deciding matters of law, and transacting other judicial business at their sittings *in banc* (as they are called), that is, on the bench of their respective courts at Westminster (*j*). For by the above-mentioned statute of 13 Edw. I. c. 30, the judges of assize and *nisi prius* are to be assigned out of the king's sworn justices, associating to themselves one or two discreet knights of each county:—by statute 27 Edw. I. c. 4, (explained by 12 Edw. II. c. 3,) assizes and inquests are allowed to be taken before any one justice of the court in which the plea was brought; associating to him one knight or other approved man of the county:—by statute 14 Edw. III. c. 16, inquests of *nisi prius* may be taken before any justice of either bench, (though the plea be not depending in his own court,) or before the chief baron of the Exchequer, if he be a man of the law;

septem anni nondum erant elapsi, postquam justiciarii ibidem ultimo sederunt."—(Annal. Eccl. Wigorn. in Whart. Angl. Sacr. i. 495.)

(*i*) Bract. l. 3, tr. 1, c. 11.

(*j*) By 33 Vict. c. 6, any of the superior courts of common law at Westminster were enabled to sit in two divisions at one time *in banc*.

[or otherwise before the justices of assize, so that one of such justices be a judge of the King's Bench or Common Pleas, or the king's serjeant sworn:]—and, lastly, by 2 & 3 Vict. c. 22, all justices of assize were empowered on their respective circuits to try causes pending in the Court of Exchequer, without issuing a separate commission from the Exchequer for the purpose—which before that Act had been considered necessary. [They have usually made their circuits in the vacations after Hilary and Trinity Terms (*k*); assizes being allowed to be taken in the holy time of Lent, by consent of the bishops at the king's request, as expressed in statute Westminster the first, 3 Edw. I. c. 51. And it was also usual, during the times of popery, for the prelates to grant annual licences to the justices of assize to administer oaths in holy times: for oaths being of a sacred nature, the logic of those deluded ages concluded that they must be of ecclesiastical cognizance (*l*). The prudent jealousy of our ancestors ordained (*m*), that no man of law should be judge of assize in his own county, wherein he was born, or doth inhabit; and a similar prohibition is found in the civil law (*n*), which carried this principle so far, as to make it equivalent to the crime of sacrilege for a man to be governor of the province in which he was born, or has any civil connexion (*o*).] But in modern times, this prohibition, always inconvenient, has been also deemed unnecessary; the apprehensions on which it is founded being sufficiently obviated by the high character and position of our judges. By statute 12 Geo. II. c. 27, and 49 Geo. III. c. 91, it was consequently abolished.

(*k*) In the vacation after Michaelmas term, a special commission has sometimes issued into certain parts of the kingdom, occasionally for the trial of causes, but chiefly to secure the more speedy trial of persons charged with offences not triable at the quarter sessions. This is called the *winter circuit*.

(*l*) Instances hereof may be met with in the Appendix to Spelman's Original of the Terms, and in Parker's Antiquities, 209.

(*m*) Stat. 4 Edw. 3, c. 2; 8 Rich. 2, c. 2; 33 Hen. 8, c. 24.

(*n*) Ff. 1, 22, 23.

(*o*) C. 9, 29, 4.

The judges upon their circuits, (which are at present eight in number,) now sit by virtue of four several authorities (*p*). 1. The commission of the *peace*. 2. A commission of *oyer* and *terminer*. 3. A commission of general *gaol delivery*.—The consideration of all which belongs properly to the subsequent book of these Commentaries. The other authority is, 4. That of *nisi prius* (*q*), which empowers them to try all questions of fact issuing out of the courts at Westminster that are then ripe for trial by jury (*r*). These, by the antient course of the courts, were usually appointed to be tried at Westminster in some Easter or Michaelmas term, by a jury returned from the county wherein the cause of action arose; but with this proviso, *nisi prius, unless before* the day prefixed the judges of assize should come into the county in question; and as in modern times they have invariably so come in the vacations preceding, the trial has always in fact taken place before those judges. And by the effect of 15 & 16 Vict. c. 76 ("The Common Law Procedure Act, 1852"), the course of proceeding in civil causes was then made no longer even ostensibly connected with the proviso of *nisi prius* (*s*); but the trial was allowed to take place, without the use of any such words in the process of the court, and as a

(*p*) Blackstone (vol. iii. p. 60) enumerates five, (including the *commission of assize*,) but the abolition of assizes and other real actions has thrown the commission of assize, as distinguished from the commission of nisi prius, out of force.

(*q*) As to the officers of *nisi prius* and their fees, see 15 & 16 Vict. c. 73.

(*r*) By 3 & 4 Will. 4, c. 71, assize towns may be fixed by order in council (and see as to building the shire halls for holding assizes, 7 Geo. 4, c. 63, and 7 Will. 4 & 1 Vict. c. 24, and as to Warwick, see 17 & 18 Vict. c. 35). By 26 & 27 Vict. c. 122, the crown was enabled, by order in council, to make alterations in the circuits. Those now existing are the Home—the Midland—the Norfolk—the Oxford—the Northern—the Western—the North Wales—and the South Wales Circuit. (See 36 & 37 Vict. c. 66, s. 93.)

(*s*) See 15 & 16 Vict. c. 76, s. 104, abolishing the jury process of *distringas juratores*, in the award of which the proviso of *nisi prius* used to be inserted.

matter of course before the judges sent under the commission into the several counties (*t*).

The practice, however, which has hitherto existed in reference to this subject must now be taken in subordination to a general enactment in the Judicature Act, 1873, by which her Majesty, by commission of assize, or by any other commission either general or special, may assign to any judge or judges of the High Court of Justice, by that Act established, or other persons usually named in commissions of assize, the duty of trying and determining within any place or district named in the commission any causes, matters, questions or issues of fact or of law, or partly of fact and partly of law, in any cause or matter depending in such High Court (*u*).

For the more convenient despatch of business, in the High Court of Justice, it is subdivided into five divisions: the first to be styled the *Chancery* division, consisting of the Lord Chancellor as president, the Master of the Rolls, and certain of the Vice-Chancellors, to whom shall be assigned such business (in general) as would have belonged before the Act to the Court of Chancery; the second, to be styled the *Queen's Bench* division, consisting of the Lord Chief Justice of England as president, and certain of the judges of the Queen's Bench, to whom shall be assigned such business (in general) as would before the Act have belonged to the Court of Queen's Bench; the third, to be styled the *Common Pleas* divi-

(*t*) By 13 & 14 Vict. c. 25, any person being one of her Majesty's counsel (or a barrister at law with patent of precedence) may be named in the commission, though he be not of the degree of the coif. By 1 Geo. 4, c. 55, s. 5, any judge or baron of the Exchequer was enabled to amend a record, and make an order in a cause on circuit, whether in a suit depending in his own court or not. By 3 Geo. 4, c. 10, the commission of the judges on circuit may be opened on the next day to the one appointed, or if that be a Sunday, &c., then on the day following.

(*u*) 36 & 37 Vict. c. 66, s. 29. This provision also extends to any cause or matter, *not* involving any question or issue of fact, which the parties may consent shall be heard and determined in like manner. (Ibid.)

sion, consisting of the Lord Chief Justice of the Common Pleas as president, and certain of the other judges of the Common Pleas, to whom shall be assigned such business (in general) as would before the Act have belonged to the Court of Common Pleas at Westminster or at Lancaster, or to the Court of Pleas at Durham; the fourth, to be styled the *Exchequer* division, consisting of the Lord Chief Baron of the Exchequer as president, and certain of the other barons of the Exchequer, to whom shall be assigned such business (in general) as before the Act would have belonged to the Court of Exchequer either as a court of revenue or of common law, or to the London Court of Bankruptcy; and the fifth, to be styled the *Probate, Divorce and Admiralty* division, consisting of the judge of the Court of Probate as president, and of the judge of the High Court of Admiralty, to whom shall be assigned such business (in general) as would before the Act have belonged to the Court of Probate, the Court for Divorce and Matrimonial Causes, or the High Court of Admiralty (*x*).

It is also enacted, that such causes and matters as are not proper to be heard by a single judge shall be heard by *divisional courts* of the High Court of Justice; that any number of such courts may sit at the same time, and shall consist of two or (if practicable) of three of the judges of the court, the president being the senior judge of those present (*y*).

And until rules of court to the contrary shall be issued, all business belonging to the Queen's Bench, Common Pleas and Exchequer divisions respectively, which according to the existing practice would have been properly disposed of in banc,—or belonging to the Chancery, Probate, Divorce or Admiralty divisions which are proper to be so heard,—may be disposed of by divisional courts, which, where practicable and convenient, shall include one or more judges attached to the particular division of the court

(*x*) 36 & 37 Vict. c. 66, ss. 31, 34. (*y*) Sect. 40.

to which the cause or matter out of which such business arises has been assigned (*z*).

II. *The Court of Appeal.* Before we enter upon the consideration of this court as established under the Judicature Act, 1873, it will be convenient to recall the attention of the reader to the system of appeal which has been hitherto in use. From the judgments then of such of the inferior courts as have a legal or equitable jurisdiction, an appeal or proceedings in error may (under the existing system) be taken to one of the superior courts of common law or to the Court of Chancery, as the case may require. In the case of most of the inferior courts existing at common law, or by antient Acts of parliament or charters, the appeal has been to the Queen's Bench exclusively. And with regard to the courts out of which the Supreme Court of Judicature is composed, the appeals from their several judgments has been to the Court of Appeal for the Court of Chancery, the Court of Exchequer Chamber, or the Judicial Committee of the Privy Council, according to the distinctions already set forth. While from the judgments of the Court of Appeal in Chancery and of the Court of Exchequer Chamber, an ultimate appeal has also hitherto been allowed to the *House of Lords*, as the supreme court of appellate judicature in the kingdom.

To this authority this august tribunal succeeded upon the dissolution of the *aula regia*. For, as the barons of parliament were constituent members of that court, and the rest of its jurisdiction was dealt out to other tribunals, over which the great officers who accompanied those barons were respectively delegated to preside,—it followed that the right of receiving appeals, and superintending all other jurisdictions, still remained in the residue of that noble assembly, from which every other great court was derived. Hence the House of Lords has been, as the general rule, a tribunal of appeal, in causes of com-

(*z*) 36 & 37 Vict. c. 66, ss. 41, 44.

mon law or equity in the English courts, and (since the union of those countries respectively) in those in the courts of Scotland or Ireland; and it has also been in such causes the last resort, from whose judgment no further appeal has been permitted; [the law reposing an entire confidence in the honour and conscience of the noble persons who compose this important assembly, that (if possible) they would make themselves masters of those questions upon which they undertook to decide; and in all dubious cases would refer themselves to the opinions of the judges, who were summoned by writ to advise them: since upon their decision all property must finally depend.]

It has not, however, been considered expedient to retain under the new system inaugurated by "The Judicature Act, 1873," any of these appellate jurisdictions. For under that Act all appeals from petty or quarter sessions, from a county court, or from any other *inferior court*, which might before its passing have been brought to any court or judge whose jurisdiction is transferred to the High Court of Justice, may be heard and determined by divisional courts of such High Court; whose determination shall be final, unless special leave be given to appeal from the same to the Court of Appeal by that Act established (*c*). To the same court is transferred all the appellate jurisdiction and powers of the Lord Chancellor and the Court of Appeal in Chancery, of the Court of Appeal in Chancery of the County Palatine of Lancaster (*d*), of the Court of the Lord Warden of the Stannaries, of the Court of Exchequer Chamber, and of her Majesty in council or the Judicial Committee in reference to admiralty or lunacy appeals; and power is also given to the crown to direct, by order in council, that *all* appeals and petitions to her Majesty in council, which, according to the

(*c*) 36 & 37 Vict. c. 66, s. 45.

(*d*) Sect. 18. It may be observed, that by 17 & 18 Vict. c. 82, the Chancellor of the Duchy and of the County Palatine, together with two of the Lords Justices, were constituted the Court of Appeal from the equitable side of the Palatine Court.

laws now in force, ought to be heard before the Judicial Committee, shall be referred for hearing to and be heard by the same Court of Appeal (*e*). And though the jurisdiction of the House of Lords as a Court of Appeal from the judgments *of the Scotch and Irish Courts* has not, for the present, been interfered with, yet it forms an express provision of the new statute that no error or appeal shall be brought from any judgment or order of the High Court of Justice, or of the Court of Appeal, or of the Chancery Court of the County Palatine of Lancaster, either to the House of Lords, or to the Judicial Committee of the Privy Council (*f*).

The Court of Appeal, thus constituted by the Judicature Act (*g*), is to consist of five *ex officio* judges (namely, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron of the Exchequer); —of a certain number (not exceeding nine) of "ordinary" judges (consisting of the Lords Justices, the paid judges of the Judicial Committee, and three other persons appointed by patent);—and of such "additional" judges as her Majesty shall from time to time appoint from among persons who, having held the office of a judge of the superior courts or of the Supreme Court, or in Scotland the office of Lord Justice General or Lord Justice Clerk, or in Ireland the office of Lord Chancellor or Lord Justice of Appeal, or in India the office of Chief Justice of one of the High Courts of Judicature,—shall signify in writing their willingness to serve (*g*).

We have already mentioned the jurisdiction which is transferred to this court from appellate tribunals hitherto in use, and it is also empowered by the Act to hear and determine appeals from any judgment or order of the High Court of Justice or of any judge or judges thereof (*h*).

(*e*) 36 & 37 Vict. c. 66, s. 21.
(*f*) Sect. 20.
(*g*) Sect. 6.
(*h*) Sect. 19.

CHAPTER VI.

OF CIVIL INJURIES,—AND HEREIN OF THE REMEDY BY ACTION GENERALLY.

WE shall now proceed to the examination of the various injuries which are cognizable in the courts—other than those which have reference to the laws ecclesiastical and maritime, and such other topics as have already incidentally received such notice as the limits of this work allow. And here we may make this general remark, that in one or other of the different courts mentioned in the two preceding chapters, every possible injury that can exist in contemplation of our laws is capable of being redressed; it being a settled and invariable principle in the laws of England, that every wrong must have a remedy (*a*).

In the course of the disquisition upon which we are about to enter, we shall at present confine ourselves to such wrongs as may be committed in the mutual intercourse between subject and subject, reserving such injuries or encroachments as may occur between the crown and subject, to be distinctly considered hereafter; as the remedy in such cases is generally of a peculiar and eccentrical nature.

To proceed, then, to the several injuries between subject and subject, cognizable in the courts. And we shall find that such injuries, according to their nature, are capable of being redressed by an action (or suit) at law, or by an

(*a*) See 3 Bl. Com. p. 23.

action (or suit) in equity; and that there are also other remedies afforded by the courts generically different from an action. In the present chapter, we shall speak of an action generally, as that remedy has been hitherto pursued in a court of law.

[Since all wrong may be considered as merely a privation of right, the plain natural remedy for every species of wrong is the being put in possession of that right whereof the party injured is deprived (*b*). This may either be effected by the specific delivery or restoration of the subject-matter in dispute to the legal owner; as when lands or personal chattels are unjustly withheld or invaded: or where that is not a possible, or at least not an adequate remedy, by making the sufferer a pecuniary satisfaction in damages; as in case of assault, or breach of contract: to which damages the party injured has acquired an incomplete or inchoate right, the instant he receives the injury, though such right be not fully ascertained till they are assessed by the intervention of the law.] The instruments whereby this remedy has been hitherto obtained by the aid of a court of common law, (for we are not for the present concerned with the remedy obtained by the aid of a court of equity,) are a diversity of *actions*, which are defined by the Mirrour to be "the lawful demand of one's right" (*c*), or as Bracton and Fleta express it, in the words of Justinian, *jus prosequendi in judicio quod alicui debetur* (*d*).

The Romans introduced pretty early set forms for actions and suits in their law, after the example of the Greeks; and made it a rule that each injury should be redressed by its proper remedy only. "*Actiones*," say the *Pandects*, "*compositæ sunt, quibus inter se homines disceptarent; quas actiones, ne populus prout vellet instituerent, certas solennesque esse voluerunt* (*e*). The

(*b*) Vide sup. vol. I. p. 136.
(*c*) Ch. 2, s. 1.
(*d*) See Inst. 4, 6.
(*e*) Ff. 1, 2, 2, s. 6.

forms of these actions were originally preserved in the books of the Pontifical College as choice and inestimable secrets, till one Cneius Flavius, the secretary of Appius Claudius, stole a copy and published them to the people (*g*). And the establishment of some *formulæ* was undoubtedly useful, to define the cases in which the law considered a wrong to have been sustained, and to ascertain the nature of the remedy which it allowed; and thus to prevent the uncertainty that would otherwise have attended a subject of so much importance as the right of action (*h*). Or, as Cicero expresses it, "*sunt jura, sunt formulæ, de omnibus rebus constitutæ, ne quis aut in genere injuriæ, aut in ratione actionis, errare possit. Expressæ enim sunt ex uniuscujusque damno, dolore, incommodo, calamitate, injuria, publicæ a prætore formulæ, ad quas privata lis accommodatur*" (*i*). With us in England, accordingly, the several actions at law have been from time immemorial conceived in fixed forms of complaint, each exclusively appropriate to the particular kind of injury for which redress is demanded (*k*).

Actions at law are subject, in the first place, to this principal division—that they are either *personal*, *real*, or *mixed* (*l*).

(*g*) Cic. pro Murœna, s. 11; De Orat. l. i. c. 41.

(*h*) Blackstone (vol. iii. p. 118) says, "the establishment of some "standard was undoubtedly neces- "sary to fix the true state of a "question of right, lest in a long "and arbitrary process it might "be shifted continually, and be at "length no longer discernible."

(*i*) Pro Q. Roscio, s. 8.

(*k*) See Glanville, passim; Bract. lib. 5, De Exceptionibus, c. 17, s. 2.

(*l*) As to this, the antient division of actions, considered in regard to their nature, and the relation which it bears to the changes introduced by the Judicature Act, 1873, vide sup. p. 319. It may be useful here to remark that the phraseology of this division is drawn from the civil law. (See Inst. 4, 6.) Among the Romans the *actio in rem* (or real action) asserted a right to something against all the world, and the *actio in personam* (or personal action) a right merely against a particular person. By all actions of the first species (and by many of the second) the thing withheld was recovered. By other personal actions (particularly such as arose

Personal actions are those whereby a man claims the specific recovery of a debt or of a personal chattel, or else satisfaction in damages for some injury done to his person or property (*m*).

Real actions,—or, as they are called in the Mirrour, *feudal* actions,—which concern real property only, are those whereby the plaintiff, here called the demandant, claims the specific recovery of any lands, tenements or hereditaments (*n*). By these actions formerly all disputes concerning real estates were decided; but in modern times they gradually became less frequent in practice, upon account of the great nicety required in their management, and the inconvenient length of their process; a much more expeditious method of trying titles being moreover since introduced by other actions, and particularly by the species called ejectment, of which we shall have occasion presently to speak. And by 3 & 4 Will. IV. c. 27, s. 36, this class of actions (subject to one or two exceptions) was at length expressly abolished.

Mixed actions are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained (*o*). But they partake, in the main, of the character of real actions, and are often so called (*p*); and they were included in the provision of 3 & 4 Will. IV. c. 27, above mentioned.

The real and mixed actions which escaped the general demolition of their class, were the following: *writ of right of dower, dower,* and *quare impedit* (*q*); and to the

out of a *tort*) damages only were recovered; and by others again, both the subject-matter of the suit and damages were recovered, and these last were called mixed actions (*actiones mixtæ*). Hence it will be observed that the connection between the classification of actions in the two systems, is little more than nominal.

(*m*) 3 Bl. Com. 117.

(*n*) Bl. Com. ubi sup. citing Mirr. c. 2, s. 6.

(*o*) Bl. Com. ubi sup.

(*p*) Co. Litt. 285 b; Roscoe, Real Actions, 1.

(*q*) Although the actions of *dower* and *quare impedit* still exist, yet (as will be more fully explained hereafter) their distinctive charac-

same class seems to belong (though somewhat doubtfully), the existing action of *ejectment* (*s*). The two first of these *lie* (in the language of the law), that is, are applicable, and are the remedies to be used, where the demandant claims lands or tenements by the particular title of dower (*t*); the first being applicable where a woman is endowed of part of her dower, and is deprived of the residue, lying in the same town, by the same tenant by whom she was endowed of part (*u*); and the second being proper in all other cases where she is entitled to dower (*x*):—*quare impedit* lies where the right to present to a benefice has been disturbed, and the object is to recover the presentation thereof:—ejectment where lands or tenements (other than such as is claimed as dower) are unlawfully withheld, and the object is their recovery. And as to the actions of *dower* and *quare impedit*, it may be observed here, that by a peculiarity that always attached to the class of real and mixed actions, they could be brought in none of the superior courts of common law except the Common Pleas (*y*). But ejectment has always been capable of being brought in any of such courts.

teristics, as real actions, have been now in a great measure lost by the assimilation of their procedure, in general, to that which obtains in other actions.

(*s*) Ejectment, prior to the statute 15 & 16 Vict. c. 76, (by which its form was remodelled,) was often considered as a *mixed* action (see 3 Bl. Com. 214); and was expressly so denominated in the stat. 3 & 4 Will. 4, c. 27. The correctness, however, of that arrangement is doubtful, for in its then form it was clearly a species of the personal action of trespass. (See Fitz. Ab. tit. Ejectione Firmæ, 2.) Under the Common Law Procedure Act, 1852, above referred to, it is difficult to fix its technical character. It seems indeed to fall properly under the definition of a real action, because it claims the specific recovery of land without damages. But in its incidents, it has no connection whatever with the antiquated remedies to which that appellation commonly belongs.

(*t*) As to an estate in dower, vide sup. vol. I. p. 266.

(*u*) Roscoe on Real Actions, 29.

(*x*) Ibid. 39.

(*y*) Accordingly, under the Judicature Act, 1873, they will belong to the *Common Pleas* division of the High Court of Justice, established

Personal actions are founded either on *contracts* (*z*) or on *torts*, a term used to signify such wrongs as are in their nature distinguishable from breaches of contract;—and these torts are often considered as of three kinds, viz. *nonfeazance*, or the omission of some act which a man is by law bound to do; *misfeazance*, being the improper performance of some lawful act; or *malfeazance*, being the commission of some act which is in itself unlawful (*a*). Actions founded on contract, are sometimes described in our books as actions *ex contractu*; and those on tort, as actions *ex delicto* (*b*).

The forms of personal actions now recognized are the following: *debt*, *covenant*, *assumpsit*, *detinue*, *trespass*, *trespass on the case*, and *replevin*; the three first being founded on contract, the remainder on tort (*c*). Of these in their order.

"Debt" lies where the object is the recovery of a certain sum of money alleged to be due from the defendant to the plaintiff (*d*); "covenant," where redress in damages

by that Act. (36 & 37 Vict. c. 66, s. 34.)

(*z*) As to contracts, vide sup. vol. II. p. 54.

(*a*) 1 Chit. Pl. 134, 1st edit.

(*b*) These expressions, also, are derived from the civil law. Thus: "*In personam actio est, quotiens* "*cum aliquo agimus, qui nobis vel* "*ex contractu vel ex delicto obli-* "*gatus est.*" Gaius, iv. 2.

(*c*) As to the distinction of actions, vide sup. p. 318. The above classification seems for most purposes correct; but it is to be noticed—1. As to *assumpsit*, that properly and *technically* considered it is one species of the form of *trespass on the case*, though, being the common remedy for the breach of a promise not made by deed, it is usually treated in practice as founded on contract, ranked as a distinct form, and of late has been usually styled an action "on promises." 2. As to *detinue*, that, though founded on a *tort*,—viz. the wrongful detainer of a chattel (see acc. Gladstone *v.* Hewitt, 1 Cr. & J. 565), the Common Pleas have nevertheless held that it is, for some purposes, to be looked at as "falling within the "class of actions called actions on "contract." (See Walker *v.* Needham, 3 Man. & Gr. 557; Danby *v.* Lamb, 13 C. B. (N. S.) 423.) And 3, as to *trespass on the case*, that, among other species in less general use, this form includes the action of *trover*, as to which more specific information will be given hereafter.

(*d*) As to debt, vide sup. vol. II. p. 142.

is sought for the breach of an agreement entered into by *deed* (*e*); "assumpsit," where damages are claimed for the breach of a promise not made by deed; "detinue," where the object is to recover a chattel personal unlawfully detained (*f*). "Trespass" lies where the plaintiff claims damages for a trespass, or (as it is more fully expressed), a trespass *vi et armis* (*g*); that is, an injury accompanied with actual force, as in the case of a battery or imprisonment—or at least implied force, as in the case of an unlawful but peaceable entry upon the plaintiff's land. And here it may be remarked, that trespasses savour of the criminal kind—being always attended with some violation of the peace, real or supposed, for which in strictness of law a fine ought to be paid to the crown, as well as a private satisfaction to the party injured (*h*). "Trespass on the case" is a form of action less antient than the rest, having apparently first come into use in the reign of Edward the third (*i*); and it was invented under the authority of the statute of Westminster, (13 Edw. I. c. 24,) upon the analogy of the old form of trespass (*k*), in order to supply a great defect in the original scheme of personal actions—a scheme devised in comparatively rude and barbarous times, and consequently comprising no

(*e*) As to a covenant, vide sup. vol. I. p. 490; vol. II. p. 54.

(*f*) It will be seen hereafter that where the object is to recover *damages* for the detention, and not the chattel itself, the proper action is *trover*.

(*g*) In actions of trespass the formal words *vi et armis* and *contra pacem*, were formerly always used in the pleadings. But by 15 & 16 Vict. c. 76, s. 49, they were directed to be omitted for the future.

(*h*) Finch, L. 198; Jenk. Cent. 158.

(*i*) Hist. of Eng. L. by Reeves, vol. iii. pp. 89, 243, 391.

(*k*) This statute provided that "whensoever from thenceforth in "one case a writ shall be found in "the chancery, and in a like case, "falling under the same right, and "requiring like remedy, no prece-"dent of a writ can be produced, "the clerks in chancery shall agree "in forming a new one; and if they "cannot agree, it shall be adjourned "to the next parliament, where a "writ shall be framed by consent "of the learned in the law; lest it "happen for the future, that the "court of our lord the king be "deficient in doing justice to the "suitors."

forms adapted to the redress of many of those injuries which in the progress of society gradually attract notice. This kind of action—which derives its name from the comparative particularity with which the circumstances of the plaintiff's case are detailed in its written allegations (*l*) —is very comprehensive in its scope, and may be said to lie in every case where damages are claimed for an injury either to person or property, not falling within the compass of the other forms. And as regards its relation to trespass, we may notice this settled distinction, that where an act is done which is in itself an immediate injury to another's person or property, there the remedy is usually by an action of trespass—but where there is no act done, but only a culpable omission, or where the act is not *immediately* injurious, but only by *consequence* or collaterally, there no action of trespass will lie, but an action on the case for the damages consequent on such omission or act (*m*). To which we may add, that where the subject-matter affected is not corporeal and tangible, so that the idea of *force* becomes inapplicable,—here, though the injury be by way of act done, and its operation be direct and immediate, the remedy is case and not trespass (*n*). Lastly, with respect to "replevin," it will be sufficient for the present to remark, that it is an action of limited application, and in practice almost invariably confined to the object of trying the legality of a *distress* levied upon the plaintiff's personal chattels (*o*).

A fitter opportunity will be found in the next chapter, of entering more at large into the applicability, in different cases, of one or other of the various forms of actions above

(*l*) 3 Bl. Com. 122.

(*m*) Scott *v.* Shepherd, 2 Bl. Rep. 892; see Gilbertson *v.* Richardson, 5 C. B. 502.

(*n*) 1 Chitty, Pl. 143, cites Com. Dig. Action, Case, Disturbance, (A. 2).

(*o*) It lies, however, in other cases also of goods unlawfully taken. (See George *v.* Chambers, 11 Mee. & W. 149; Mellor *v.* Leather, 1 Ell. & Bl. 619.)

enumerated, and also of referring to the particular *species* which some of them comprise—but there are some points besides those hitherto mentioned, which, as relating to actions in general, seem to require notice in this place.

Thus actions have been classed as being either *local* or *transitory;* the former being founded on such causes of action as necessarily refer to some particular locality, as in the case of trespasses to land; the latter on such causes of action as may be supposed to take place anywhere—as in the case of trespasses to goods, batteries, and the like. Real actions are always in their nature local, personal are for the most part transitory. The distinction between local and transitory actions is this—that the former, as the general rule, must have been tried in the county where the cause of action really arose, and by a jury of that county; the latter might be tried in any county, at the discretion (in general) of the plaintiff(*p*). And it followed from this, that when an injury is committed out of England, and its nature is such as to make the action local, no action at all would lie for its redress in any English court. On the other hand, that where the nature of the injury is such that the action was transitory, such action would lie in the English courts, whether the injury was committed in England or elsewhere (*q*).

Personal actions are also subject, (as sufficiently ap-

(*p*) However by 3 & 4 Will. 4, c. 42, s. 22, power was given to a judge to order the trial in a local action to be had elsewhere, if it was shown to his satisfaction that such course would be more convenient. (As to this provision, see Greenhow *v.* Parker, 6 H. & N. 882.)

(*q*) It is apprehended that these consequences still follow: but it forms one of the provisions of the schedule of Rules of Procedure annexed to the Judicature Act, 1873, that after the commencement of that Act in November, 1874, there shall be no local venue for the trial of any action; but when the plaintiff proposes to have the action tried elsewhere than in Middlesex, he shall name the place he proposes in his statement of claim, and unless a judge otherwise orders it shall be there tried; and if no place be named it shall be tried in Middlesex. (36 & 37 Vict. c. 66, sched. r. 28.)

pears by preceding explanations,) to the distinction of being either brought for the specific recovery of property, or for damages. As regards the competency of the latter kind of remedy, it is to be remarked, that an action for damages will in general lie wherever a right has been invaded—or, in other words, an injury committed,—although no damage shall have been actually sustained; it being material to the establishment and preservation of the right itself, that its invasion shall not pass with impunity (*r*). Thus an action by one commoner against another, for surcharging the common, (that is, turning on more cattle than he was entitled to do,) has been held maintainable, although the plaintiff may not himself have turned on any cattle of his own during the same year, and can therefore have sustained no actual loss (*s*). In such cases, there being no ground for awarding damages to any considerable amount, the plaintiff recovers some trifling sum by way of *nominal* damages; in addition to which, the defendant has in general to sustain the costs of the action, including in some cases those incurred by his adversary (*t*).

It is however requisite, in order to sustain an action for damages, that the plaintiff shall have sustained some loss or inconvenience, whether actual or nominal, of a kind proper and peculiar to himself:—for where the damage is of a merely public character, and affects the subjects of the realm at large as well as the plaintiff, no civil action lies; but the law considers the injury, in that case, as amounting to a crime, and consequently as a fit subject for

(*r*) 1 Saund. by Wms. 346 b.

(*s*) Wells *v.* Watling, 2 Bl. Rep. 1233; and see Marzetti *v.* Williams, 1 B. & Adol. 426; Blofeld *v.* Payne, 4 B. & Adol. 410.

(*t*) But where the plaintiff recovers less than 10*l.*, he will not be entitled to any costs from the defendant, unless the judge certify on the record that there was sufficient reason for bringing such action in the superior court, or makes a rule or order for costs. (30 & 31 Vict. c. 142, s. 5; see also sect. 29.)

an indictment. Hence no action can be maintained for an encroachment on the highway; but the offender is liable to be indicted as for a public misdemeanor. Wherever extraordinary damage, indeed, is sustained by an individual, he has in general a right of action as for redress of a civil injury, though the case may in its circumstances also amount to a crime. Thus, in the case last supposed, if by means of a ditch dug across a public way, which is a common nuisance, a man or his horse suffer any injury by falling therein, then for this particular damage, which is not common to others of the lieges, the party shall have his action (*u*). And so in the case of unlawful violence designedly done to the person, though that always amounts, in contemplation of law, to a crime, yet the party injured is entitled to his civil remedy. But even here this distinction is to be observed, that in case such crime amounts to a felony the remedy for the private injury is *suspended* until the sufferer has fulfilled his duty to the public, by prosecuting the offender for the public crime; though in the case of a mere misdemeanor,—such as an assault, battery, libel, and the like,—the right of action is subject to no such impediment (*x*).

Moreover, though an action will lie, (as we have seen,) for an injury unattended with actual loss or damage, yet none can be maintained even for loss or damage actually inflicted, unless it result from an injury—that is, an invasion of a right; it being a maxim, that a mere *damnum absque injuriâ* is not actionable. Thus, if I have a mill, and my neighbour builds another mill upon his own ground, *per quod* the profit of my mill is diminished, yet no action lies against him, for every one may lawfully erect a mill on his own ground. But if I have a mill

(*u*) 3 Bl. Com. 220. See Wilks v. Hungerford Market, 2 Bing. N. C. 281.

(*x*) See Crosby v. Leng, 12 East, 409; White v. Spettigue, 13 Mee. & W. 303.

by prescription on my own land (*y*), and another erects a new mill, which draws away some portion of the stream from mine, so as to diminish its former power, an action will lie against him of trespass on the case (*z*).

It may also be remarked, that a plaintiff is not entitled to recover in respect of any damage that is too *remote;* or, in other words, he cannot recover unless the damage he has suffered flows naturally and directly from the injury committed (*a*). Thus, where the plaintiff, who as director of musical performances had engaged a certain public singer, brought an action for the publication of a libel on her, alleging that she was thereby deterred from performing in public, through the apprehension of being ill received, so that the plaintiff lost the profits he would otherwise have gained,—it was held that the damage was too remote, and the action not maintainable (*b*).

Again, as to suits of every class, in certain cases, the right to sue thereon is transferred by the operation of law (*c*). Thus the rights of action of a bankrupt, pass (with certain exceptions) to his trustees; and upon the death of either of the parties between whom a cause of action has arisen, the right of maintaining such action survives in general, to or against his executors or administrators (*d*); and to these, as well as to the trustees, the right also belongs of *continuing* actions, which the deceased, or the bankrupt, has commenced (*e*). In re-

(*y*) As to prescription, vide sup. vol. I. p. 685 et seq.

(*z*) Bac. Ab. Actions on the Case (C), and the authorities there cited.

(*a*) Com. Dig. Action on Case, Defamation.

(*b*) Ashley *v.* Harrison, 1 Esp. 48; and see a variety of cases decided on the same principle, such as Kelly *v.* Partington, 5 B. & Adol. 645; Knight *v.* Gibbs, 1 Ad. & El. 43; Green *v.* Button, 1 Tyr. & G. 118; Langridge *v.* Levy, 4 Mee. & W. 337.

(*c*) As to an assignment *in writing* of a debt or other legal chose in action under the Judicature Act, 1873, see 36 & 37 Vict. c. 66, s. 25, subs. (6).

(*d*) See Stubbs *v.* Holywell, Law Rep., 2 Exch. 311.

(*e*) 15 & 16 Vict. c. 76, ss. 137, 138; and see 17 & 18 Vict. c. 125, s. 92.

spect, indeed, to suits which are founded on certain violations of personal rights,—as, in the case, for example, of an action for slander,—the maxim is, that they *die with the person* (*f*). And this originally extended to every case of *tort* (*g*). But (except in reference to causes of action for violation of personal rights of the description just referred to), this antient rule has been now set aside by various acts of parliament. For by 4 Edw. III. c. 7, actions may be maintained *by* executors or administrators, for trespasses to the personal property of the testator or intestate. And by 3 & 4 Will. IV. c. 42, s. 2, actions may be maintained *by* executors or administrators, for any injury committed in his lifetime to his real estate,—provided it was committed within six calendar months before, and the action brought within one year after, his death. And by the statute last named, it was also provided, that actions may be maintained *against* executors or administrators, for any wrong committed by the deceased in respect of his property either real or personal,—provided it was committed within six calendar months before his death, and the action is brought within six calendar months after the executors or administrators have taken on themselves the administration. And, lastly, by 9 & 10 Vict. c. 93 (amended by 27 & 28 Vict. c. 95), it is enacted, that whenever the death of a person shall be caused by such wrongful act, neglect or default, as would, (if death had not ensued,) have entitled the party injured to maintain an action for damages, the wrongdoer may be sued for the benefit of the wife, husband, parent or children of the person injured (*h*); and this, although the death shall have been caused under such circumstances as amount in law

(*f*) 3 Bl. Com. 302.

(*g*) 1 Chit. Pl. 56. As to *torts*, vide sup. p. 363.

(*h*) As the general rule the action is to be brought by the executor or administrator; but if there be none, or no action be brought by them within six months after the death, the action may be brought by all or any of the parties to be benefited by the result. (27 & 28 Vict. c. 95, s. 1.)

to felony. And the jury may give damages proportionable to the injury resulting from such death, to be divided among the parties for whose benefit the action is brought, in such shares as they shall by their verdict direct (*i*).

(*i*) The cases on the construction of the 9 & 10 Vict. c. 93 (usually called "Lord Campbell's Act") are numerous. They establish (among other things) that the jury are not entitled to take into their consideration, in assessing the damages, the *feelings* of the survivors as distinct from their pecuniary loss. These and other points on the statute will be found adverted to, in Chapman *v.* Rothwell, 1 Ell. Bl. & Ell. 168; Duckworth *v.* Johnson, 4 H. & N. 653; and Pym *v.* Great Northern Railway Company, 4 B. & Smith, 396.

CHAPTER VII.

OF CIVIL INJURIES COGNIZABLE AT COMMON LAW.

HAVING in the course of the last chapter entered into some explanations with regard to the nature of the remedy by action at law generally, we now resume our inquiry into the various injuries which may be thus redressed, to the right apprehension of which we have deemed some preliminary acquaintance with the scheme of such actions essential.

The rights which are severally due to the different members of the community, and the establishment and maintenance of which has been considered in this work as the great objects of municipal law,—were divided, (as we may remember,) into personal rights, rights of property, rights in private relations, and public rights (*a*). It will be convenient, therefore, in proceeding to a further investigation of our present subject, to subject civil injuries, (which are but the violations of so many rights,) to a similar distribution.

I. First, then, as to such injuries as affect *personal* rights, viz. the right of personal security, (comprising those of life, limbs, body, health and reputation,) and the right of personal liberty (*b*).

Of injuries which affect the *life* of man, it is sufficient to remark, that they are not merely civil wrongs, but,—where committed with intention to affect it,—amount to

(*a*) Vide sup. vol. I. p. 138. (*b*) Ibid.

one of the most atrocious species of crimes (*c*). These therefore shall for the present be passed by, and reserved for the concluding Book of these Commentaries, viz. that which relates to the criminal law.

As to injuries affecting a man's *limbs or body*, these may be committed, 1. By *threats* (or menaces of bodily hurt), through fear of which a man's business is in fact interrupted. But it is to be noticed that a menace alone, without any consequent inconvenience, makes not the injury: but to complete the wrong, there must be both of them together (*d*). 2. By *assault;* which is an attempt or offer to beat a man without proceeding to touch him (*e*): as if one lifts up his cane or his fist in a threatening manner at another, or strikes at him, but misses him, this is an assault, *insultus*, which Finch describes to be "an unlawful setting upon one's person" (*f*). 3. By *battery;* which is the beating of another. The least touching of another's person, wilfully or in anger, is a battery (*g*); for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it,—every man's person being sacred, and no other having a right to meddle with it in any manner (*h*). 4. By *wounding;* which consists in giving another some dangerous hurt, and is only an aggravated species of battery. 5. [By *mayhem;* which is an injury still more atrocious, and consists in violently depriving another of the use of a member proper

(*c*) In certain cases, an injury destroying life may by statute (as we have seen) form the subject of an action for damages on behalf of the family of the deceased in respect of the *civil* wrong thereby suffered; and this, even when the death is caused under circumstances amounting to felony on the part of the defendant. (Vide sup. p. 370.)

(*d*) 3 Bl. Com. p. 120, citing Finch, L. 202.

(*e*) Bl. Com. ubi sup. See Reed *v.* Coker, 13 C. B. 850.

(*f*) Finch, ubi sup.

(*g*) Bl. Com. ubi sup. See Coward *v.* Baddeley, 4 H. & N. 478.

(*h*) On a similar principle the Cornelian law *De injuriis* prohibited *pulsation* as well as *verberation;* distinguishing verberation, which was accompanied with pain, from pulsation, which was attended with none. (Ff. 47, 10, 5.)

[for his defence in fight. This is a battery attended with this aggravating circumstance, that thereby the party injured is for ever disabled from making so good a defence against future external injuries, as he might otherwise have done. Among these defensive members are reckoned not only arms and legs, but a finger, an eye, and a fore-tooth (*i*), and also some others (*k*); but, it is said that, the loss of one of the jaw-teeth, the ear, or the nose, is no mayhem at common law, as they can be of no use in fighting.] For each of these injuries,—threats, assault, battery, wounding and mayhem,—an action will lie, whereby adequate damages may be recovered. And for the four last, at least, an indictment may be brought as well as an action (*l*). It is to be observed, however, as to all these acts, that to render them either actionable or indictable, they must be committed on an unlawful occasion; for under certain circumstances they may be justifiable, and then form no just ground of complaint either civil or criminal. Thus assault and battery are justifiable where one who has authority, as a parent or master, gives moderate correction to his child, his scholar, or his apprentice (*m*). So also on the principle of self-defence (*n*); for if one strikes me first, or even only assaults me, I may strike in my own defence, and if sued for it, may plead *son assault demesne* (*o*), or that it was the plaintiff's own original assault that occasioned it; and supposing a dangerous scuffle thereon to take place, I may even, for my own preservation (but not otherwise) wound or maim my adversary, and justify it under a similar plea (*p*). So

(*i*) Finch, L. 204.

(*k*) 1 Hawk. P. C. 111.

(*l*) As to the punishment of an *assault* (which is implied in every case of battery, wounding or mayhem) either by indictment or (in certain cases) by way of summary conviction, vide post, vol. IV. pp. 97, 98, 331.

(*m*) Hawk. P. C. bk. i. c. 61, s. 23; see Winstone *v.* Linn, 1 B. & C. 469.

(*n*) Vide sup. p. 241.

(*o*) Oakes *v.* Wood, 3 Mee. & W. 150.

(*p*) Cockcroft *v.* Smith, 2 Salk. 642.

likewise in defence of my goods or possessions, if a man endeavours to deprive me of them, I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away (*q*). Thus, too, in the exercise of an office, as that of churchwarden or beadle, a man may lay hands upon another to turn him out of church, and prevent his disturbing the congregation; and if sued for this or the like battery, he may set forth the whole case, and plead that he laid hands upon him gently, *molliter manus imposuit*, for this purpose (*r*). 6. The limbs and bodies of individuals may also be affected by indirect or consequential, as well as immediate injury,—particularly by *negligence* in the performance of duties; as in the case where a passenger in a coach is overturned by the carelessness of the driver (*s*). The remedy for this sort of injury is an action of trespass on the case (*t*); which may be brought against the coach proprietor, not only where he is guilty of the negligence in his own person, but also where the fault was that of his servant; it being a general principle applicable to all torts whatever,—that a man is civilly liable not only for what he does in his own person, but for what he does in the person of another, who acts at the time by his authority: for "*qui facit per alium, facit per se.*" Another consequential injury to the bodies of individuals, falling under the same head, is that of damage done to the person, by a brute animal used to do mischief (*u*); in which case the owner must answer for the consequences, provided the plaintiff can prove the *scienter*, that is, can show that the

(*q*) Finch, L. 203.

(*r*) Vide sup. vol. II. p. 699.

(*s*) Brotherton *v.* Woodrod, 3 B. & Bing. 54; Randleson *v.* Murray, 8 Ad. & El. 109; Lynch *v.* Nurdin, 1 Q. B. 29.

(*t*) See Gordon *v.* Rolt, 4 Exch. 365; Sharrod *v.* London and North Western Rail. Co. ibid. 580.

(*u*) May *v.* Burdett, 9 Q. B. 101; Card *v.* Case, 5 C. B. 622, and Hudson *v.* Roberts, 6 Exch. 697; Cox *v.* Burbidge, 13 C. B. (N. S.) 430; Worth *v.* Gilling, Law Rep., 2 C. P. 1, are recent instances of actions brought for injuries caused by animals.

owner knew of such evil habit (*v*). There may, however, be circumstances in which mischief caused by an animal, though known to be dangerous, will not support an action; as, for example, in the case of a dog, kept for the protection of its owner's house and yard, if carefully confined within the premises, and the injury be caused by the plaintiff's having entered the same improperly, or without sufficient caution (*x*). With respect, however, to the liability of the owners of dogs, it has been rendered more onerous by a recent statute, which has provided that if an action be brought for an injury by a dog to *cattle or sheep*, it shall not be necessary for the plaintiff to show either a previous mischievous propensity in the dog or knowledge by the owner of such propensity, or even that the injury complained of was attributable to neglect on the part of such owner (*y*).

Injuries affecting a man's *health* are, where by any unwholesome practices of another a man sustains any damage in his vigour or constitution. As by selling him bad provisions or wine (*z*); by the exercise of a noisome trade, which infects the air in his neighbourhood (*a*); or by the neglect or unskilful management of the surgeon, or apothecary, who attends him (*b*). For it hath been solemnly resolved that *mala praxis*, whether it be for

(*v*) See May *v.* Burdett, 9 Q. B. 101.

(*x*) See Bates *v.* Crosbie, M. T. 1798, in the King's Bench, cited in Christian's Black. vol. iii. p. 154.

(*y*) 28 & 29 Vict. c. 60. The word "cattle" in the above statute includes "horses and mares." (Wright *v.* Pearson, Law Rep., 4 Q. B. 582.) It may be noticed, that by a subsequent Act to protect the public against dogs (34 & 35 Vict. c. 56), it is provided, that such as are dangerous and not kept under proper control, or are allowed to stray on the highways, may be detained and, under certain circumstances, destroyed.

(*z*) 1 Rol. Abr. 90; R. *v.* Souther-ton, 6 East, 133. See also George *v.* Skivington, Law Rep., 5 Exch. 1.

(*a*) 9 Rep. 58; Hutt. 135; R. *v.* Dewsnap, 16 East, 194.

(*b*) See Dr. Groenvelt's case, 1 Ld. Raym. 214; Seare *v.* Prentice, 8 East, 348; Slater *v.* Baker, 2 Wils. 359; Hancks *v.* Hooper, 7 Car. & P. 81; Lanphier *v.* Phipos, 8 Car. & P. 475.

curiosity and experiment, or by neglect, is a grave offence at common law; because it breaks the trust which the party had placed in his physician, and tends to the patient's destruction (*c*). These are wrongs or injuries for which there is a remedy in damages, by an action of trespass on the case; and in case of gross misconduct, the party may in some cases also be indicted (*d*).

Injuries affecting a man's *reputation* or good name are, first, by speaking respecting him malicious and defamatory words. And as to this injury (the remedy for which is also by trespass on the case), we may in the first place remark, that though malice is a necessary ingredient, yet where the words spoken are in a legal sense "defamatory," and it does not appear that they were used on any such lawful occasion as to rebut the supposition of malice, the law will always conclude them to be malicious (*e*). [The principal cases in which words will be considered defamatory, so as to amount to the legal injury of which we now speak, are as follows: viz. where a man utters anything of another which may either endanger him in law, by impeaching him of some punishable crime,—as to say that he hath poisoned another, or is perjured (*f*); or which may exclude him from society,—as to charge him with having an infectious disorder tending so to exclude him (*g*); or which may impair or hurt his trade or livelihood (*h*),—as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave; or which may disparage him in an office of public trust,—as to say of a magistrate that

(*c*) 3 Bl. Com. 122; 1 Ld. Raym. 214.

(*d*) See R. *v.* Long, 4 Car. & P. 398; ibid. 407, n. (*a*).

(*e*) As to this, see 15 & 16 Vict. c. 76, s. 61.

(*f*) Finch's Law, 185. See Huckle *v.* Reynolds, 7 C. B. (N. S.) 114.

(*g*) Such as "leprosy." See Com. Dig. Act. Def. (D. 28); Bloodworth *v.* Gray, 7 Man. & G. 334.

(*h*) See Jones *v.* Littler, 7 Mee. & W. 423; Bellamy *v.* Burch, 16 Mee. & W. 590; Southee *v.* Denny, 1 Exch. 196; Evans *v.* Harries, 1 H. & N. 251; Brown *v* Smith, 13 C. B. 596.

[he is partial and corrupt (*i*). It is further to be observed, that for scandalous words of the several species before mentioned, an action on the case may be had, without proving any particular damage to have happened, but merely upon the probability that it might happen (*k*).] But with regard to disparaging words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, though these also may amount to the injury now under consideration, it is necessary that the plaintiff should aver (and prove) some particular damage to have happened, which is called laying his action with a *per quod* (*l*). As if I say of a commission agent, that he is an unprincipled man, and borrows money without repaying it, this is not in itself actionable; but if I say this to a person who was going to deal with him, and he forbear to do so in consequence of its being said,—here, there being special damage, an action will lie against me (*m*). So if I impute heresy or adultery to another, if he can show that he was thereby exposed to some temporal damage, he may sue me at law and recover damages for such injury (*n*); and the case is the same if I impute unchastity to a woman, and she can show that she

(*i*) 3 Bl. Com. 123; Com. Dig. Act. Def. (D. 28); 2 Cro. 90; Ashton *v.* Blagrave, Ld. Raym. 1369. Words spoken in derogation of a peer, judge or other great officer of the realm, —which are called *scandalum magnatum*,—are held to be particularly heinous. And though they may be such as would not be actionable in case of a common person, they are made punishable by imprisonment and damages by many antient statutes. (3 Edw. 1, c. 34; 2 Rich. 2, st. 2, c. 5; 12 Rich. 2, c. 11; and see King *v.* Sir E. Lake, 2 Vent. 28; 3 Bl. C. 123.) No resort to this action has, however, been had in modern times.

(*k*) See Foulger *v.* Newcomb, Law Rep., 2 Exch. 327.

(*l*) See Hopwood *v.* Thorn, 8 C. B. 293; Barnett *v.* Allen, 3 H. & N. 376.

(*m*) See Storey *v.* Challands, 8 Car. & P. 234.

(*n*) Parret *v.* Carpenter, Noy, 64; 3 Bl. Com. 125. See Gallwey *v.* Marshall, 9 Exch. 294. Formerly scandalous words concerning matters merely spiritual were cognizable in the *ecclesiastical courts;* but suits for defamation in those courts were abolished by 18 & 19 Vict. c. 41.

has thereby lost a marriage or some pecuniary advantage (*o*). And in like manner, if I slander another man's *title*, by spreading (not in the *bonâ fide* assertion of my own title) such injurious reports as, if true, would deprive him of his estate—as to call the issue in tail, or one who hath land by descent, a bastard,—it is actionable, provided any special damage accrues to the proprietor thereby; as if he loses an opportunity of selling the land (*p*). It is, however, to be understood, that even where special damage has been sustained in consequence of words spoken with respect to person or property, yet if the words are not in themselves disparaging, it is *damnum absque injuriâ*, and no action can be maintained upon them (*q*). So where disparaging words are spoken of a kind which would otherwise be actionable in themselves, or which would be actionable because attended with special damage,—yet if they be spoken in a friendly manner, as by way of advice, admonition, or concern, without any tincture or circumstance of ill-will, they will not sustain an action; for in such case they are not *maliciously* spoken, which is part of the definition of the injury in question (*r*). And in like manner all such statements are *primâ facie* protected, as it is usual to comprehend under the name of *privileged* communications (*s*),—viz. those derogatory indeed to the private

(*o*) Com. Dig. Act. Def. (D. 30). See Lynch *v.* Knight, 7 H. of L. Cas. 577; Parkins *v.* Scott, 1 H. & C. 153; Wilby *v.* Elston, 8 C. B. 142. It is said that words imputing unchastity to a woman are actionable by the custom of London in the city courts, without showing special damage (Com. Dig. ubi sup. F. 20; Pulling's Laws of London, 186), and that a similar custom exists at Bristol. (See Power *v.* Shaw, 1 Wils. 62.)

(*p*) As to slander of title, see Smith *v.* Spooner, 3 Taunt. 246; Brook *v.* Raul, 4 Exch. 521; Steward *v.* Young, Law Rep., 5 C. P. 122.

(*q*) Kelly *v.* Partington, 5 B. & Ad. 645.

(*r*) See Pater *v.* Baker, 3 C. B. 831.

(*s*) The cases upon what are called friendly or privileged communications are very numerous. The following may (amongst others) be consulted with advantage. Rogers *v.* Clifton, 3 Bos. & Pul. 594; Knight *v.* Gibbs, 1 A. & E. 43; Martin *v.* Strong, 5 A. & E. 535; Padmore *v.* Lawrence, 11 A. & E. 380; Tuson

character of another, but uttered on such lawful occasions as tend to rebut the inference of malice, which would otherwise arise from their being made; as where a man communicates to another circumstances which it is right that he should know in relation to a matter in which they have a mutual interest, but tending to the disparagement of a third person; or where a man, on being asked as to the character of one who has left his service, charges him with a theft (*u*). For in such cases as these no action lies, unless some proof of malice beyond the mere utterance be given, as that they were false to the knowledge of the defendant, at the time when he made the statement (*x*). In reference to this injury to the reputation, it is further to be understood that if the defendant be able to prove the words he has spoken to be *true*, the action will be

v. Evans, 12 A. & E. 733; Fountain *v.* Boodle, 3 Q. B. 5; Griffiths *v.* Lewis, 7 Q. B. 61; Blagg *v.* Sturt, 10 Q. B. 899; Simpson *v.* Robinson, 12 Q. B. 743; Coxhead *v.* Richards, 2 C. B. 569; Blackham *v.* Pugh, ibid. 611; Bennett *v.* Deacon, ibid. 628; Hopwood *v.* Thorn, 8 C. B. 293; Somerville *v.* Hawkins, 10 C. B. 583; Kershaw *v.* Bailey, 1 Exch. 743; Taylor *v.* Hawkins, 16 Q. B. 308; Gilpin *v.* Fowler, 9 Exch. 615; Harris *v.* Thompson, 13 C. B. 333; Manby *v.* Witt, 18 C. B. 544; Huntley *v.* Ward, 6 C. B. (N. S.) 514; Amann *v.* Damm, 8 C. B. (N. S.) 597; Whiteley *v.* Adams, 15 C. B. (N. S.) 393; Force *v.* Warren, ib. 806; Jackson *v.* Hopperton, 16 C. B. (N. S.) 829. As to expressing an opinion on the public acts of official persons, see Gathercole *v.* Miall, 15 Mee. & W. 319. As to reporting legal proceedings, see Lewis *v.* Levy, 1 Ell. Bl. & Ell. 537; Hoare *v.* Silverlock, 9 C. B. 20. As to reporting a public meeting, see Davison *v.* Duncan, 7 Ell. & Bl. 229. As to reporting parliamentary debates, see Wason *v.* Walter, Law Rep., 4 Q. B. 73. As to a superior officer expressing his opinion of his subordinate, see Dawkins *v.* Paulet, Law Rep., 5 Q. B. 94.

(*u*) Vide sup. vol. II. p. 233.

(*x*) See Spill *v.* Maule, Law Rep., 4 Exch. 232. In Lord Northampton's case, 12 Rep. 134, it is laid down that where the words spoken by the defendant are a mere repetition of what he has himself heard from another, and he names his author at the time, he is not liable to an action. (But see Lewis *v.* Walker, 4 B. & Ald. 614; M'Pherson *v.* Daniels, 10 B. & C. 269; De Crespigny *v.* Wellesley, 5 Bing. 392.) No action for slander will lie against a *witness* in a legal proceeding for speaking falsely and maliciously. The only remedy is to indict him for perjury, or to sue him for the penalty given, in such cases, by 5 Eliz. c. 9. (See Revis *v.* Smith, 18 C. B. 126.)

barred; and this whether they were or were not in law defamatory, or whether special damage ensued or not, or whether they were spoken on a privileged occasion or not. And hence if I can prove the tradesman a bankrupt, the physician a quack, and the lawyer a knave, this will destroy their respective actions (*y*).

A second way of affecting a man's reputation is by publishing a *libel* upon him (*z*); which, as regards the present purpose, may be defined to be some writing, picture, or the like, containing malicious and defamatory matter (*a*). The nature of this injury and its remedy, are in general similar to what has been already laid down in the case of words spoken,—but subject to some material differences. For not only such imputations as will support an action for words spoken, but all contumelious matter that tends to degrade a man in the opinion of his neighbours, or to make him ridiculous, will amount, when conveyed in writing, or by picture, or the like, to libel (*b*). Again, while oral defamation is ground for an action only, there are, in the case of a published libel, two remedies—one by indictment, (or by criminal information,) and the other by action (*c*); the former for the

(*y*) 3 Bl. Com. 125. A similar rule prevailed in the civil law: "*eum qui nocentem infamat, non est æquum et bonum ob eam rem condemnari; delicta enim nocentium nota esse oportet et expedit.*" (Ff. 47, 10, 18.)

(*z*) As to what amounts to publication of a libel, see Tidman *v.* Ainslie, 10 Exch. 63.

(*a*) Besides *defamatory* libels, there are those of a blasphemous, seditious, or immoral kind: as to which vide post, vol. IV. p. 259.

(*b*) See Thorley *v.* Lord Kerry, 4 Taunt. 355; Cook *v.* Ward, 6 Bing. 409; Lord Churchill *v.* Hunt, 2 B. & Ald. 685; Hearne *v.* Stowell, 12 A. & E. 719; Cheese *v.* Scales, 10 Mee. & W. 488; Capel *v.* Jones, 4 C. B. 259; Campbell *v.* Spottiswoode, 3 B. & Smith, 769; Cox *v.* Lee, Law Rep., 4 Exch. 284. The proper course at the trial of an action for libel is, for the judge to define to the jury what a libel is in point of law, and then to leave it to the jury to say whether the publication in question falls within that definition. (Parmiter *v.* Coupland, 6 Mee. & W. 105.) By Mr. Fox's Act, (32 Geo. 3, c. 60,) the law is settled the same way in a criminal prosecution for libel.

(*c*) Accordingly under the Judicature Act, 1873, a criminal informa-

public offence, (for every libel has a tendency to provoke a breach of the peace,) and the latter to compensate in damages, the person who has been libelled (*e*). And formerly the rule was, that, on an indictment or criminal information, the defendant was not allowed to allege the truth of the libel by way of justification; for even if true, it tended nevertheless to a breach of the peace (*f*). But in the action for damages, the defendant might, (in like manner as for words *spoken*,) adopt that line of defence (*g*). And with regard to an action, such is still the law; but a material alteration has been made in the case of an indictment or information by the 6 & 7 Vict. c. 96, an "Act for amending the law respecting defamatory words and libel." By this statute (as amended by 8 & 9 Vict. c. 75) it is provided, that, in pleading to any indictment or information for defamatory libel, the defendant may, by way of defence (or plea), allege the truth of the matters charged; and further, that it was for the public benefit that the matters charged should be published,—showing the particular fact or facts by reason whereof it was for the public benefit: but on the other hand, that if after such plea the defendant shall be convicted, it shall be competent to the court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the plea and the evidence thereon (*h*). These statutes also contain certain other provisions as to the law respecting defamation which shall here be noticed. Thus, 1. In an *action* for a libel inserted in a newspaper or other periodical, it shall be competent to the defendant to plead that it was inserted without actual malice, and without

tion for libel will lie in the *Queen's Bench* division of the High Court of Justice established by that Act. (36 & 37 Vict. c. 66, s. 34.)

(*e*) As to the framing the pleadings in such action with *innuendos*, as to the defendant's meaning, see 15 & 16 Vict. c. 76, s. 61, and Hemmings *v.* Gasson, 1 Ell. Bl. & Ell. 346.

(*f*) 5 Rep. 125.

(*g*) Lake *v.* Hatton, Hob. 253; 11 Mod. 99.

(*h*) As to this provision, see The Queen *v.* Newman, 1 Ell. & Bl. 558.

gross negligence (*i*); and that before the commencement of the action, or at the earliest opportunity afterwards, he inserted in the same publication a full apology (*k*):—it being, however, also provided, that, to render such plea effectual, the defendant shall, at the same time, pay into court a sum of money by way of amends for the injury sustained (*l*). 2. In all *indictments* or *informations* by a private prosecutor for the publication of a defamatory libel, if judgment be given for the defendant, he shall be entitled to costs from the prosecutor; and if, on a special plea of justification under the statute, the issue shall be found for the prosecutor, the defendant shall be liable to pay the prosecutor the costs occasioned by such plea (*m*). 3. In every action for defamation, *whether oral or written*, it shall be lawful for the defendant, (after notice in writing of his intention so to do, duly given to the plaintiff at the time of pleading,) to give in evidence in mitigation of damages, that he made or offered an apology to the plaintiff before the commencement of the action,—or as soon afterwards as he had an opportunity, in case the action had been commenced before an opportunity could be found.

A third way of destroying or injuring a man's reputation is by preferring a malicious indictment or prosecution against him; for under the mask of justice and public spirit, the process of the law is sometimes made the engine of private spite and enmity (*n*). For this, however, an adequate remedy is afforded by awarding damages in an action on the case for a false and malicious prosecution:

(*i*) See Chadwick *v.* Herapath, 3 C. B. 885.

(*k*) See Lafone *v.* Smith, 3 H. & N. 735; Jones *v.* Mackie, Law Rep., 3 Exch. 1. If the publication is ordinarily published at intervals exceeding a week, the defendant may plead that he had offered to publish the apology in any newspaper or periodical to be selected by the plaintiff. (6 & 7 Vict. c. 96.)

(*l*) 8 & 9 Vict. c. 75, s. 2. See Jones *v.* Mackie, ubi sup.

(*m*) As to the manner of pleading a justification, see Tighe *v.* Cooper, 7 Ell. & Bl. 639.

(*n*) See Turner *v.* Ambler, 10 Q. B. 252.

and this may be brought either against a single person; or against several, with an allegation that they conspired together for the purpose (*o*). However, any probable cause for preferring a prosecution is sufficient to justify the defendant. Indeed, in order to maintain this action, the burthen lies on the plaintiff of showing that no probable cause existed (*p*): and it is also essential for him to prove either that he was acquitted upon such prosecution, or that it was in some other manner legally terminated in his favour (*q*). Thus he may show that the indictment was rejected by the grand jury, or quashed by the court; for it is not the danger of the plaintiff, but the scandal, vexation, and expense to which he is put, upon which this action is founded (*r*).

The right of personal *liberty* may be invaded by the injury of false imprisonment (*s*): for which the law has given a reparation to the party injured; in removing (by means of the writ of *habeas corpus*) his actual confinement for the present, and also by allowing him to recover the damages he has sustained by the loss of time and liberty, in an action against the wrong-doer.

[To constitute the injury of false imprisonment there are two points requisite: 1. The detention of the person; and 2. The unlawfulness of such detention. Now every confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the

(*o*) 1 Saund. by Williams, 229 a.

(*p*) As to the nature of this action, see Johnstone *v.* Sutton, 1 T. R. 549; Blackford *v.* Dod, 2 B. & Adol. 179; Delisser *v.* Towne, 1 Q. B. 333; Panton *v.* Williams, 2 Q. B. 169; Musgrove *v.* Newell, 1 Mee. & W. 582; Michell *v.* Williams, 11 Mee. & W. 205.

(*q*) Morgan *v.* Hughes, 2 T. R. 225; Willes, 520, n.; Whitworth *v.* Hall, 2 B. & Adol. 695.

(*r*) See Jones *v.* Gwynn, 10 Mod. 19, 220; Chambers *v.* Robinson, Str. 691.

(*s*) See as to false imprisonment, Edgell *v.* Francis, 1 Man. & Gr. 222; Glynn *v.* Houstoun, 2 Man. & Gr. 337; Jones *v.* Gurdon, 2 Gale & D. 133; Smith *v.* Eggington, 7 Ad. & El. 167; Mitchell *v.* Forster 12 A. & E. 72; Bird *v.* Jones, 7 Q. B. 742; Turner *v.* Ambler, 10 Q. B. 252.

[stocks, or even by forcibly detaining one in the street(*t*). Unlawful, or false, imprisonment consists in such confinement or detention without sufficient authority: which authority may arise either from some process from the courts of justice, or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment; or from some other special cause warranted for the necessity of the thing,—such as the arresting of a felon by a private person without warrant(*u*). False imprisonment also may arise by executing a lawful warrant or process at an unlawful time, as on a Sunday; for the statute 29 Car. II. c. 7, s. 6, hath declared that such service, except in cases of treason, felony, breach of the peace, or other indictable offence, shall be void(*x*).]

II. We arrive next, according to the order proposed, at the consideration of such injuries as affect the right of *property*(*y*): and we will consider in the first place such as affect the right of property in things *real*, or (as they may be more compendiously described) injuries to real property; and then, injuries to personal property.

[Injuries to real property are principally six:—1. Ouster; 2. Trespass; 3. Nuisance; 4. Waste; 5. Subtraction; 6. Disturbance.

1. *Ouster*, or dispossession, is an injury, that may be sustained in respect of hereditaments either corporeal or incorporeal (*z*), whereby the wrongdoer gets into the

(*t*) 2 Inst. 589.

(*u*) It may be observed, that an arrest under process *lawful in itself*, if maliciously procured, is an invasion of the right of personal liberty, as well as an injury to the reputation.

(*x*) See Rawlins *v.* Ellis, 16 Mee. & W. 172.

(*y*) Vide sup. p. 372.

(*z*) The idea of ouster, however, is more directly applicable to a corporeal hereditament, or *land*. As regards those which are incorporeal, it is in general, as Blackstone (vol. iii. p. 170) remarks, "nothing more "than a disturbance of the owner "in the means of coming at or "enjoying them;" and therefore it was always held that a disseisin of these amounted to an ouster only at the *election* of the party injured,

[actual occupation of the land or hereditament, and obliges him that hath a right to seek his legal remedy in order to gain possession with damages for the injury sustained (*h*). And such ouster or dispossession may either be of the *freehold*, or of *chattels real*.

Ouster of the *freehold* is effected by various methods: 1. By *abatement;* which is where a person dies seised of an inheritance, and, before the heir or devisee enters, a stranger who has no right makes entry, and gets possession of the freehold; this entry of him is called an abatement, and he himself is denominated an abator (*i*). 2. By *intrusion;* which is the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion. And it happens where a tenant for term of life dieth seised of certain lands and tenements, and a stranger entereth thereon after such death of the tenant, and before any entry of him in remainder or reversion (*k*); such stranger being termed, in the technical sense of the word, an intruder. 3. By *disseisin* (*l*); which is a wrongful putting out of him that is seised of the freehold: not, as in the other cases, a wrongful entry

—if, for the purpose of more easily trying the right in a real action, he was pleased to suppose himself disseised.

(*h*) There may be ouster between tenants in common, coparceners and joint tenants. (Co. Litt. 199 b, 373 b; Smales *v.* Dale, Hob. 120; see Stedman *v.* Smith, 8 Ell. & Bl. 1.)

(*i*) Finch, L. 195. Blackstone (vol. iii. p. 168) remarks, that this "expression of *abating*, which is "derived from the French, and "signifies to quash, beat down, or "destroy, is used by our law in "three senses. The first, which "seems to be the primitive sense, is "that of abating or beating down "a nuisance, (and in a like sense it "is used in stat. Westm. 1, 3 Edw. "1, c. 17, where mention is made of "*abating* a castle or fortress); the "second is that of abating a writ "or action, where it is taken figuratively, and signifies the overthrow "or defeating of such writ by some "fatal exception to it; the last is "also a figurative expression, to denote that the rightful possession or "freehold of the heir or devisee is "overthrown by the rude intervention of a stranger."

(*k*) Co. Litt. 277; F. N. B. 203, 204.

(*l*) As to disseisin, see Taylor *v.* Horde, 1 Ld. Ken. 143; Doe *d.* Maddock *v.* Lynes, 3 B. & C. 388; Doe *v.* Hall, 2 Dow. & Ry. 38; William *v.* Thomas, 12 East, 141.

[where the possession was vacant, but an attack upon him who is in actual possession, and turning him out of it: and as the two former kinds were an ouster from a freehold in law, so this is an ouster from a freehold in deed. All these three modes, it is to be observed, are such wherein the entry of the tenant *ab initio*, as well as the continuance of his possession, is unlawful; but the two remaining are where the entry of the tenant was at first lawful, but the wrong consists in the detaining of possession afterwards. 4. By *deforcement;* this, in its most extensive sense, is *nomen generalissimum;* a much larger and more comprehensive expression than any of the former: it then signifying the holding of any lands or tenements to which another person hath a right (*m*). So that this includes as well an abatement, an intrusion, or a disseisin, as any other species of wrong whatsoever, whereby he that hath right to the freehold is kept out of possession. But, as contradistinguished from the former, it is only such a detainer of the freehold from him that hath the right of property, but never had any possession under that right, as falls within none of the injuries which we have before explained. As in case where a lord has a seigniory, and lands escheat to him *propter defectum sanguinis*, but the seisin of the lands is withheld from him (*n*): here the injury is not *abatement*, for the right vests not in the lord as heir or devisee; nor is it *intrusion*, for it vests not in him who hath the remainder or reversion; nor is it *disseisin*, for the lord was never seised; but being neither of these three, it is therefore a *deforcement* (*o*). If a man marries a woman, and during the coverture is seised of lands in fee simple, or fee tail, and is disseised and dies; or dies in possession; no act having been done in either of these cases to bar or defeat his widow's dower (*p*); and

(*m*) Co. Litt. 277. And see as to deforcement, Co. Litt. by Butl. 331 b, n. (1).

(*n*) Vide sup. vol. I. p. 436.

(*o*) F. N. B. 143.

(*p*) Vide sup. vol. I. pp. 272—277.

[the disseisor or heir enters on the tenements, and doth not assign the widow her dower, this is also a deforcement to the widow, by withholding lands to which she hath a right (*q*); that is, by remaining in possession of the entire lands of the deceased, without setting forth for her any particular lands, in satisfaction of her general claim to one-third. In like manner, if a man lease lands to another, for a term of years or for the life of a third person, and the term expires by surrender, efflux of time, or death of the *cestui que vie;* and the lessee or any stranger who was, at the expiration of the term, in possession, holds over, and refuses to deliver the possession to him in remainder or reversion,—this is likewise a deforcement (*r*). Another species of deforcement is where two persons have the same title to land, and one of them enters and keeps possession against the other,—as where the ancestor dies seised of an estate in fee simple, which descends to two sisters as coparceners, and one of them enters before the other, and will not suffer her sister to enter and enjoy her moiety; this is also a deforcement (*s*).] In addition to all which modes of ouster, there was formerly another, viz., 5. By *discontinuance;* which was where a tenant in tail in possession made a feoffment (*t*) in fee simple, or for the life of the feoffee, or in tail,—all which are beyond the common-law power of a tenant in tail to make; for that extends no further than to make a lease for his own life, so as to be available against the issue or those in remainder or reversion (*u*). Such feoffment would formerly pass an estate in fee simple by *wrong;*

(*q*) F. N. B. 8, 147.

(*r*) Finch, L. 263; F. N. B. 201, 205—7.

(*s*) Finch, L. 293, 294; F. N. B. 197; Co. Litt. 199 b.

(*t*) Prior to the abolition of fines by 3 & 4 Will. 4, c. 74, a discontinuance might also be effected by a fine. (Co. Litt. 327 b.)

(*u*) Blackstone (vol. iii. p. 172) lays it down absolutely, that his power extends no further than to make a lease for his own life; and this is according to the text of Littleton. But the qualification above introduced is required to make that proposition an accurate one. See Co. Litt. by Butl. 331 a, n. (1).

and therefore on the death of the feoffor became an injury to the heir in tail, or those in remainder or reversion, (as the case might be,) which was termed a discontinuance (*x*). But now, by 8 & 9 Vict. c. 106, s. 4, a feoffment made after the 1st October, 1845, shall not have any tortious operation; so that the title by discontinuance, and consequently the injury of that species of ouster, seem to be abolished (*y*).

[Secondly. Ouster of *chattels real* consists—1. Of amotion of possession from estates held by statute, recognizance, or elegit (*z*); which happens by a species of disseisin, or turning out of the legal proprietor, before his estate is determined by raising the sum for which it is given him in pledge. And 2. Of amotion of possession from an estate for years (*a*), which also takes place by a like kind of disseisin, ejection, or turning out of the tenant from the occupation of the land during the continuance of his term.]

The several species and degrees of injury by ouster being thus ascertained, the next consideration is its remedy.

But for the better illustration of this subject, as to which great changes have been introduced in modern times, it will be necessary here to take some retrospect of the *former* state of the law with respect to the means of redress for a wrongful ouster.

According to that system, the injury admitted of a variety of remedies, the competency of which depended on the lapse of time and other circumstances; and the distinctions which obtained on this subject may be compendiously stated as follows:

First. In the case of abatement, intrusion and disseisin,

(*x*) Co. Litt. 327 b.

(*y*) This important effect formerly belonged to a discontinuance, that it took away the right of entry of the heir in tail, remainderman, or reversioner (as the case might be). But the law was altered in this respect by 3 & 4 Will. 4, c. 27. Vide sup. vol. I. p. 510, n. (*e*).

(*z*) Bl. Com. vol. iii. p. 198. As to the several estates here mentioned, vide sup. vol. I. pp. 309, 310.

(*a*) As to this estate, vide sup. vol. I. p. 282.

the party ousted might recover the possession by means of an action, that is, by one of the *real*, (by which we always include, unless the contrary is indicated, *mixed*,) actions: and these were divided into two principal classes, viz., actions *possessory*, in which the object was to ascertain the right of possession: and actions *droitural*, brought to determine the right of property (*b*). But, as in the particular cases of ouster just mentioned, the abator, intruder, and disseisor, had obviously a mere naked possession without colour of right, the law also gave the injured party the alternative in such cases of recovering possession at once, (where land was the subject of the ouster,) by the extrajudicial and summary method of *entry* mentioned in the first chapter of the present book (*c*). If he neglected, however, to avail himself of this for twenty years, (being under no disability in respect of infancy or the like,) his entry after that time was barred by the Statute of Limitations, 21 Jac. I. c. 16.

Next, if the abator, intruder, or disseisor died seised, and the land descended to his heir,—or (in general) if the ouster took place by any of the species of deforcement,—the heir or the deforciant (as the case might be) was considered as clothed with a species of presumptive title, sometimes called an *apparent right of possession* (*d*); for the heir in respect of his descent, and the deforciant in respect of the lawful inception of his title, had evidently a better or more colourable right than that gained by mere abatement, intrusion, or disseisin. Under such circumstances, therefore, the possessors were deemed not liable to expulsion by mere entry, but the estate or interest of the person ousted was said to be *turned to a right* (*e*); and it became

(*b*) 2 Bl. Com. 197; 3 Bl. Com. 179. The actions possessory were divided into writs of *entry* and writs of *assize*; the former being of such a nature as *disproved* the title of the tenant by showing the unlawful commencement of his possession; the second of a nature to prove the title of demandant, by merely showing his, or his ancestor's, possession. (3 Bl. Com. 185.)

(*c*) Vide sup. p. 243.

(*d*) 2 Bl. Com. 196; 3 Bl. Com. 179.

(*e*) By *turning to a right* it is "generally meant, that the person

necessary for him to resort to a real action, either possessory or droitural. So he might be driven to betake himself to a real action even as against an abator, intruder, or disseisor, in consequence of having allowed twenty years to elapse without exercising his right of entry.

Here, however, it becomes necessary to notice the following exceptions:—First, that though in general the right of entry, as already stated, was taken away (or *tolled*), by the descent so *cast*, (as the term was,) upon the heir of the abator, intruder, or disseisor; yet if the claimant were under any legal disability during the life of the ancestor by whom the ouster was effected,—such as infancy, or the like,—the descent had no such operation. Secondly, that by the statute 32 Hen. VIII. c. 33, if the ouster took place by way of *disseisin*, no descent to the heir of the disseisor was to take away the entry, unless the disseisor himself had peaceable possession for five years. Lastly, that though in general there was no right of entry on a *deforciant*, yet a man might enter on his tenant at sufferance, for such tenant hath no freehold, but only a bare possession, which may be defeated, like a tenancy at will, by the mere entry of the owner (*f*).

Again, if the claimant, where his estate was turned to a right in the manner above described, neglected to resort to his possessory action within the period allowed by law in that behalf; (for every such action was subject to its appropriate time of limitation, varying from thirty to fifty years;)—or if the ouster took place upon a discontinuance,—the adverse party was considered as having acquired not merely an apparent, but an actual, *right of posses-*

" whose possession is usurped can-
" not restore it by entry, and can
" only recover it by action."—Co. Litt. by Butl. 332 b, n. (1). Blackstone (vol. ii. p. 197) uses this expression as if it applied to the case where not only the entry, but the right to bring a possessory action, was taken away, and nothing remained but the mere *right*, or *right of property*. But this is not the sense in which it has been ordinarily used.

(*f*) As to tenant at sufferance, vide sup. vol. I. p. 293.

sion (*g*)—the effect of which was that the claimant was driven, (as the only remaining expedient,) to bring his real action droitural, in order to establish his *right of property*, or *mere right*, as it was also denominated (*h*); and by the establishment of the right of property, the right of possession was defeated. Of such actions, the principal one was the *writ of right* (*i*); sometimes called, to distinguish it from others of the droitural class, the writ of right *proper*. They were all subject, like actions possessory, to a certain period of limitation, that in the writ of right, (which was the most extended,) being sixty years.

But though this was the antient and proper system of remedy provided by our law, for cases of ouster of land, it became gradually nearly superseded in practice, by a comparatively modern invention of anomalous character, to which claimants had been driven to resort by the inadequacy of the regular methods. For the redress by entry was one rarely in fact available,—particularly as the law required it to be made in a peaceable manner, and subjected to severe penalties those who attempted to regain their tenements by a strong hand. And with respect to the real actions, whether possessory or droitural,

(*g*) 2 Bl. Com. 196; 3 Bl. Com. 179. These were the principal cases; but there was also that of judgment being given against either party, (whether by default or on trial of the merits,) in a possessory action—for such judgment for ever bound the right of possession. (3 Bl. Com. 191.)

(*h*) 2 Bl. Com. 197.

(*i*) There was an instance of a writ of right, commenced as recently as the year 1835. (See Davies *v.* Lowndes, 1 Bing. N. C. 597; S. C. 1 C. B. 435; 3 C. B. 808.) The writ of right was considered as "the highest writ in the law." (3 Bl. Com. 193.) But, besides this, there were writs *in the nature* of a writ of right; such as the writ of *formedon*, which was the remedy for tenant in tail on a discontinuance, for he could not have a writ of right proper. (3 Bl. Com. 191; see also Tolson *v.* Kaye, 6 Man. & G. 536; Cannon *v.* Rimington, 12 C. B. 1, 515.) It was competent to the tenant, when sued in a writ of right, to plead that he had more right to hold than the demandant to claim, which was called the *mise* upon the mere right; and this question, or issue, he might at his option refer, either to a species of jury called the *grand assize*, or to *trial by battle;* as to which, vide post, vol. IV. p. 411.

they were generally unacceptable remedies, from their liability to the following disadvantages—that the course of proceedings in them was dilatory and intricate (*k*);—that the judgment in them was conclusive, so that the plaintiff, failing by any accident in one, was not at liberty to bring another of the same species (*l*);—and that they could be brought only in one of the courts of Westminster Hall, viz., the Common Pleas (*m*). From such disadvantages, however, *personal* actions were exempt; and the practitioners of our courts were thus led to the device of adapting one of these to the object of recovering the possession of land, so as to preclude the necessity of resorting to an action real. This invention appears to be due to the reign of Henry the seventh or Henry the eighth (*n*); and the personal action applied to the purpose, was the species of trespass called trespass *de ejectione firmæ*,—afterwards compendiously called *an ejectment*,—which lay where the plaintiff was a lessee for years, and claimed damages for the injury of ouster from his chattel real. The contrivance was preceded (and perhaps suggested) by a decision of the courts, declaring that, besides the judgment for damages, the plaintiff in an ejectment was entitled to an award of restitution of the term itself (*o*); and this

(*k*) 3 Bl. Com. 184, 205; Hist. Eng. L. by Reeves, vol. iv. p. 166.

(*l*) Hist. Eng. L. by Reeves, vol. iv. p. 166.

(*m*) Ibid. 170. Accordingly under the Judicature Act, 1873, such real actions as still exist (viz. *dower* and *quare impedit*) will belong to the Common Pleas division of the High Court of Justice established by that Act, on its commencement in November, 1874 (36 & 37 Vict. c. 66, s. 34).

(*n*) Hist. Eng. ubi sup., where it appears that it was not till the reign of Hen. 8, that real actions began to give place to ejectments; though the practice of applying ejectments occasionally to the trial of titles, began as early as Hen. 7. (And see 3 Bl. Com. 201.)

(*o*) So adjudged, 14 Hen. 7; and the same doctrine had been previously laid down by Fairfax, (7 Edw. 4, 6 b,) though the contrary had been held in the time of Edw. 3 and Rich. 2. The courts of law seem to have adopted this new doctrine in emulation of the practice of the courts of equity, which obliged the ejector to make specific restitution. See 3 Bl. Com. 200; Hist. Eng. L. by Reeves, vol. iii. p. 390; vol. iv. p. 165; and 1 A. & E. 751 (n.)

point being once established, the object in view was obtained through the medium of a fiction, the nature of which will be more particularly noticed hereafter; and of which it is sufficient at present to say, that it had the effect of enabling any party who had been ousted of land,—whatever the nature of his title or the circumstances of the ouster might be,—to bring his case forward in the name of a third person claiming in the character of his *lessee for years*, and complaining of an expulsion from the leasehold. Its applicability, however, was subject to this important exception; that as it involved an actual entry made, or supposed to be made, by the true claimant, on the lands in dispute for the purpose of making the pretended lease,—for it was held that a person out of possession could not lawfully convey title to another,—the fiction was incapable of being applied, except where such claimant had a *right of entry*; the effect of which exception was, that though real actions were in general supplanted by ejectment soon after its introduction, yet recourse was still necessarily had to the former kind of remedy in some particular instances (*p*). The principal of these were the case where a woman claimed dower; or where the ouster, which was the subject of complaint, had taken place by way of abatement, intrusion, or disseisin, and had been followed by a descent cast, or a lapse of twenty years without entry made; or where it had taken place by way of discontinuance;—in the first of which cases it is to be observed, that there was no right of entry in the widow, but only a right to have her portion of land set forth; and in the three last, viz., the descent cast, the non-entry for twenty years, and the discontinuance,—the right of entry, which had once existed, was at an end (*q*).

(*p*) To convey a title to another, when the grantor is not in possession of the land, falls under the legal offence of maintenance; and indeed "it was doubted at first," says Blackstone (vol. iii. p 201), "whether this occasional possession in "ejectment," taken merely for the purpose of conveying the title, "excused the lessor from the legal "guilt of maintenance."

(*q*) The account above given of

And such continued to be the state of the law with respect to the remedy upon ouster of land, during the long period that elapsed between the time of Henry the eighth and that of William the fourth; but in the latter reign,—the attention of the legislature having been particularly called to the improvement of our legal institutions, and among the rest to those which related to real property,—it was deemed expedient, as regards the three last cases of ouster above enumerated, to place the law upon a different basis. For it seemed unjust to the true owner of land, from whom the possession was withheld, to allow his right of entry to be defeated by such circumstances as those of descent cast and discontinuance; and inexpedient on the other hand to allow him any remedy whatever, after he had neglected to vindicate his right for more than twenty years, the period to which the proceeding by entry, and consequently by ejectment, had already been long confined. It appeared desirable, too, to expunge real actions in general from our list of remedies, as the greater part of them had been latterly found to be mere instruments of mischief in the hands of unprincipled practitioners; who employed them "to defraud persons in a low condition of "life of their substance, under pretence of recovering for "them large estates, to which they had no colour of "title" (*r*). Under the influence of these views (suggested by the Real Property Commissioners), an Act was passed in the year 1833, (3 & 4 Will. IV. c. 27,) containing *inter alia* the following provisions—that no descent cast or discontinuance happening after 31st Dec. 1833, should toll or defeat any right of entry, or action for the recovery of land—and that, except in certain cases of disability

the former state of the law relating to real actions, is purposely condensed to the highest degree consistent with clearness of exposition. What Blackstone wrote hereon (vol. iii. c. 10) is much more copious, and exhibits a learning and ability not surpassed, perhaps, in any part of his Commentaries; but the changes of the law on this subject have almost annihilated the value of that part of his labours.

(*r*) First Report of Real Property Commissioners, p. 42.

therein specified, no entry should be made or action brought to recover land but within twenty years after the right accrued. Moreover, with respect to the remedy for ouster by way of real or mixed actions, this same statute effected that demolition of them as a class (with one or two exceptions) the nature and extent of which has been already specified (*s*).

We may next advert to the *present* modes of remedy in the case of ouster; and, first, in the case of land, or hereditaments corporeal. The only proper remedy here, is by way of specific recovery; a mere action for damages, though it will also lie, being in general obviously inadequate to the nature of the injury; and the only modes of obtaining a specific recovery, which are now generally applicable (since the alterations effected by the above statute), are by entry or by the action of ejectment; that is, by an action newly modelled by the 15 & 16 Vict. c. 76 (the "Common Law Procedure Act, 1852,") upon the former action of the same name, discarding its fictions, but retaining its character in substance (*t*).

Of entry, enough has been already said. As to ejectment, it is to be remarked, that it lies, (as may be col-

(*s*) Vide sup. p. 361.

(*t*) There are, however, some particular cases of ouster for which particular remedies are provided, besides those above specified. Thus in the case of a *forcible entry* and ouster (vide sup. p. 244), the statutes against forcible entries and detainers give the power to justices of the peace to restore possession. In cases between landlord and tenant, where half-a-year's rent is in arrear, and the tenant has deserted the premises and left the same uncultivated or unoccupied, without any sufficient distress thereon,—the enactments 11 Geo. 2, c. 19, s. 16; and 57 Geo. 3, c. 52, (and within the metropolitan district, 3 & 4 Vict. c. 84, s. 13; and 11 & 12 Vict. c. 43, s. 34,) authorize a proceeding before justices of the peace to obtain restitution. (See Ashcroft *v.* Bourne, 3 B. & Ad. 684; Edwards *v.* Hodges, 15 C. B, 477; Delaney *v.* Fox, 1 C. B. (N. S.) 166.) Also by 59 Geo. 3, c. 12, ss. 17, 24, 25, paupers intruding into *parish property* may be dispossessed in the same way. And see the provisions of 1 & 2 Vict. c. 74, and 19 & 20 Vict. c. 108, giving the same remedy in certain cases of tenants holding over against their landlords, mentioned, sup., vol. I. p. 295.

lected from preceding matter,) wherever there exists a right of entry in the claimant; which indeed comprises, since the alterations introduced by the above-mentioned statute of 3 & 4 Will. IV. c. 27, almost every case in which there is any right to recover land, whatever may be the nature of the title, or of the ouster sustained (*u*). On the other hand, an ejectment cannot, as we have seen, be maintained where there is *no* right of entry; and therefore it will not lie for dower, nor (in general) upon an ouster of any hereditaments incorporeal (*x*).

As to dower, there are (as already incidentally mentioned) two actions for its recovery, both being of the real class (*y*). The first of these,—the writ of right of dower,—one of the varieties of the writ of right proper, has been at all times of rare occurrence; being adopted only in the very particular predicament of the widow's having been endowed of parcel and being deforced of the residue, lying in the same town, by the wrong of the same tenant (*z*). It is the other species of dower, *unde nihil habet*, which we commonly understand when an action of dower generally is mentioned (*a*). This is brought by the widow as demandant against the heir as tenant of the freehold (*b*), and its effect is to enable the former to recover from the latter the seisin of a third part of the tenements to which her dower has attached, to be set forth to her in severalty by metes and bounds for the

(*u*) Ejectment lies between tenants in common, coparceners, or joint tenants, upon an actual ouster of one by the other. (Co. Litt. 199 b; Doe *v.* Hind, 11 East, 49.) So, one of several tenants in common, &c. may bring ejectment for his share against a stranger. (Roe *v.* Lonsdale, 12 East, 39.)

(*x*) Blackstone however (vol. iii. p. 206), notices an exception to this, viz., in the case of tithes "in the "hands of lay appropriators, by "the express provision of statute "32 Hen. 8, c. 7, which hath "since been extended by analogy "to tithes in the hands of the "clergy."

(*y*) Co. Litt. 31 a.

(*z*) 3 Bl. Com. 183.

(*a*) See an instance of this action brought in the year 1849, Garrard, *dem.*, Tuck, *ten.*, 8 C. B. 231.

(*b*) Com. Dig. Pleader, 2 Y. 15; 2 Saund. by Wms. 43 (*a*).

term of her natural life, together with damages and costs (*c*).

With respect to the remedy upon ouster of hereditaments incorporeal, these also, it is said, may be claimed in the action of dower, supposing the claimant to be a dowress (*d*); and tithes may be recovered (as we have seen) in ejectment: and a next presentation, (as we shall see hereafter,) in an action of *quare impedit*. But, as the general rule, there is now no remedy by which incorporeal hereditaments can be specifically recovered; and the party injured must resort to a personal action of trespass on the case, in which he recovers such damages as he may have sustained by the invasion of his right (*e*). But this in general amounts to as complete a vindication of such right, as if he had obtained judgment for its specific recovery.

2. Having considered the injury of ouster, we now arrive at that of *Trespass;* by which is here intended a trespass committed in respect of another man's *land*, by entry on the same without lawful authority; which, as distinguished from trespass to his person or his goods, is technically called trespass *quare clausum fregit* (*f*). [For the right of *meum et tuum* (or property) in lands being once established, it follows, as a necessary consequence, that this right must be exclusive; that is, that the owner may retain to himself the sole use and occupation of his soil. Every entry, therefore, thereon without the owner's leave, and especially if contrary to his express order, is a transgression; and, being in the nature of an immediate and forcible injury thereto, is a trespass. The

(*c*) 2 Saund. by Wms. 44 (*e*). By 3 & 4 Will. 4, c. 27, s. 41, arrears of dower cannot be recovered for more than the last six years.

(*d*) Rosc. Real Act. 40.

(*e*) See Challenor *v.* Thomas, Yelv. 143. It may, however, be mentioned as an exceptional instance to the contrary, that in certain cases freehold rents may be recovered in the action of *debt*.

(*f*) As to the definition of trespass in general, vide sup. p. 364.

[Roman laws indeed seem to have made a direct prohibition necessary, in order to constitute this injury. "*Qui in alienum fundum ingreditur, potest a domino, si is prohibere, prohiberi ne ingrediatur*" (*g*). But the law of England, justly considering that much inconvenience may happen to the owner, before he has an opportunity to forbid the entry, has carried the point much further, and has treated every entry upon another's lands (unless by the owner's leave, or in some very particular cases), as an injury or wrong, for satisfaction of which an action will lie to recover such damages as a jury may think proper to assess (*h*); and this injury is called trespass *quare clausum fregit* (*i*),—for breaking a man's *close*,—because every man's land is, in the eye of the law, inclosed and set apart from his neighbour's: and that either by a visible and material fence, as one field is divided from another by a hedge; or by an invisible boundary, existing only in the contemplation of the law, as when one man's land adjoins to another's in the same field.

A person must have an actual possession by entry, to be able to maintain an action of trespass *quare clausum fregit* (*k*): and hence before such entry and possession he cannot maintain this action, though he hath the freehold in law (*l*). And therefore an heir, before

(*g*) Inst. 2, 1, 12.

(*h*) In case of the offence called *forcible entry*, (vide sup. p. 244,) an action will also lie by statute to recover treble damages. But this applies only to a degree of force calculated to excite fear (see R. *v.* Smith, 5 Car. & P. 201); and proceedings under the statutes of forcible entry are not very usual.

(*i*) This species of action is so called from the language of the writ of trespass (now disused), which commanded the defendant to show *quare clausum querentis fregit*.

(*k*) 2 Roll. Abr. 553; and see Wheeler *v.* Montefiori, 2 Q. B. 133. Blackstone says, (vol. iii. p. 210,) "that there must be a *property*, "either absolute or temporary, in "the soil, and actual possession by "entry." It is clear, however, that he who has any exclusive possession may maintain the action, though he has no other property or interest. (See Lambert *v.* Stroother, Willes, 221; Catteris *v.* Cowper, 4 Taunt. 547; Com. Dig. Trespass.)

(*l*) 2 Roll. Abr. 553. As to freehold in law, vide sup. vol. I. p. 441.

[entry, cannot have his action against an abator (*m*); and though a disseisee might have it against the disseisor, for the injury done by the disseisin itself, at which time the plaintiff was seised of the land, yet he cannot have it for any act done after the disseisin, until he hath gained possession by re-entry; but then he may well maintain it for the intermediate damage done; for after his re-entry, the law, by a kind of *jus postliminii*, supposes the freehold to have all along continued in him (*n*). Neither, by the common law, in case of an intrusion or deforcement, could the party kept out of possession sue the wrong-doer by a mode of redress which was calculated merely for injuries committed on the land while in the *possession* of the owner. But now by the statute 6 Ann. c. 18, if a guardian or trustee for any infant, a husband seised *jure uxoris*, or a person having any estate or interest determinable upon a life or lives, shall, after the determination of their respective interests, hold over and continue in possession of the lands or tenements without the consent of the person entitled thereto, they are adjudged to be trespassers.

A man is answerable not only for his own trespass, but for that of his cattle also: for if by his negligent keeping they stray upon the land of another (and much more if he permits or drives them on), and they there tread down his neighbour's herbage, or spoil his corn or his trees, this is a trespass for which the owner must answer in damages. And the law gives the party injured a double remedy in this case; by permitting him to distrain the cattle thus *damage feasant*, or doing damage, till the owner shall make him satisfaction (*o*); or else by leaving him to the common remedy, *in foro contentioso*, by action.

In some cases an entry on another's land or house, is justifiable; as where it is done in exercise of a right of

(*m*) 2 Roll. Abr. 553.

(*n*) 11 Rep. 5. See the case of Barnett *v.* Guildford, 11 Exch. 19.

(*o*) As to this, vide sup. p. 251.

[way, a right of common, or the like: or where a man enters to demand or pay money there payable; or to execute, in a legal manner, the process of the law; or enters by the licence of the owner himself. Also a man may justify entering into an inn without the leave of the owner first specially asked; because when a man professes the keeping of such inn, he thereby gives a general licence to any person to enter his doors. So a landlord may justify entering to distrain for rent; and a reversioner to see if any waste be committed on the estate, for the apparent necessity of the thing (*p*). And it has been said that the common law warrants the hunting of ravenous beasts of prey, as badgers and foxes, in another man's land, if no greater damage be done than is necessary; because the destroying such creatures may be profitable to the public (*q*). But in cases where a man misdemeans himself, or makes an ill use of the authority with which the law intrusts him, he shall be accounted a trespasser *ab initio* (*r*): as if one comes into a tavern, and will not go out in a reasonable time, but tarries there all night, contrary to the inclinations of the owner: this wrongful act shall affect and have relation back even to his first entry, and make the whole a trespass (*s*). But a bare nonfeasance, as not paying for the wine he calls for, will not make him a trespasser, for this is only a breach of contract.] In like manner if a landlord distrained cattle for rent, and wilfully killed the distress, or committed any other irregularity, this by the common law made him a

(*p*) Blackstone (vol. iii. p. 213) notices also, and apparently holds, the opinion, that by the common law of England the poor are allowed to enter on a man's ground and glean after harvest. But it has been since his time decided that no such right exists. (Steel *v.* Houghton, 1 H. Bl. 51.)

(*q*) Genish *v.* Mynns, Cro. Jac. 321; Gundry *v.* Feltham, 1 T. R. 334. But see Earl of Essex *v.* Capel, before Lord Ellenborough, Hertford Assizes, A.D. 1809, cited in Chitty's Game Law, p. 31.

(*r*) 8 Rep. 146; Finch, L. 47; Bagshawe *v.* Goward, Cro. Jac. 148.

(*s*) 2 Roll. Abr. 561.

trespasser *ab initio* (*t*): but we have seen that, under the statutable provision of 11 Geo. II. c. 19, this is now otherwise (*u*).

3. We are next to consider the injury of nuisance, (*nocumentum*, or annoyance,) a term which signifies any thing that worketh hurt, inconvenience or damage. And a nuisance is of two kinds; such as is *public* or *common*, which affects the public, and is an annoyance to all the lieges; for which reason it belongs to the class of public wrongs or crimes, and may be the subject of an indictment: and such as is *private*, which is the object of our present consideration, and may be defined as anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another, but which does not amount to a trespass thereon (*x*). We will, first, mark out the several kinds of nuisances, and then mention their respective remedies.

As to *corporeal* hereditaments, if a man builds a house so close to mine, that his roof overhangs my roof, and the water flows off his roof upon mine, this is a nuisance, for which an action will lie (*y*). And the case is the same if the boughs of his tree are allowed to grow so as to overhang my land, which they had not been accustomed to do (*z*). Also, if a person keeps his hogs, or other noisome animals, so near the house of another, previously built and inhabited (*a*), that the stench of them incommodes him, and makes the air unwholesome, this is a nuisance, as it tends to deprive his neighbour of the use and benefit of his house (*b*). A like injury is, if any

(*t*) Finch, L. 47.

(*u*) Vide sup. p. 257.

(*x*) F. N. B. 188.

(*y*) Ibid. 184.

(*z*) Norris *v.* Baker, 1 Roll. Rep. 393; Lodie *v.* Arnold, 2 Salk. 458.

(*a*) This is a necessary qualification; for if I build my house near his hog-sty, the case is altered, and it is *damnum absque injuriâ*. (1 Smith's Leading Cases, 4 ed. 131.)

(*b*) Aldred's case, 9 Rep. 58; R. *v.* White, 1 Burr. 337.

offensive trade be set up and exercised close to my land; as a tanner's, a tallow chandler's, a brick-maker's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places (*c*). Thus, too, it has been decided that if one erects a smelting-house so near the land of another that the vapour and smoke thereof kill his corn and grass, or damage his cattle, it is a nuisance (*d*). And the case is the same if a man, by carelessness in excavating his own ground, causes the fall of a house erected on land adjoining (*e*). And it may be laid down generally, that if one does any act, in itself lawful, which yet, being done where it is, necessarily tends to damage the land of another, it is a nuisance; for it is incumbent on him to find some other place to do that act, where it will be less offensive—the rule being, in this as well as in the other examples above given, *sic utere tuo, ut alienum non lædas.* So also a nuisance may arise by an omission to perform a legal duty, as if my neighbour is bound to scour a ditch and does not, whereby my land is overflowed (*f*). On the other hand, it is to be remarked that depriving one of a mere matter of pleasure, as of a fine prospect by building a wall, or the like, or opening a window upon a neighbour whereby his privacy is disturbed, is not an actionable nuisance; inasmuch as such conduct, however ungentlemanly, does not abridge anything really necessary or convenient, and is, therefore, no

(*c*) Morley *v.* Pragnel, Cro. Car. 510. Upon this difficult subject the following cases may be usefully consulted; Stockport Waterworks Company *v.* Potter, 7 H. & N. 160; Hole *v.* Barlow, 4 C. B. (N. S.) 334; Cavey *v.* Ledbitter, 13 C. B. (N. S.) 470; Bamford *v.* Turnley, 3 B. & Smith, 62. Per Willes, J., in The Wanstead Board of Health *v.* Hill, 13 C. B. (N. S.) 484; Crump *v.* Lambert, Law Rep., 3 Eq. Ca. 409.

(*d*) 1 Roll. Abr. 89.

(*e*) Dodd *v.* Holme, 1 Ad. & El. 493; and see Wyatt *v.* Harrison, 3 B. & Adol. 876; Humphries *v.* Brogden, 12 Q. B. 739; Smith *v.* Kenrick, 7 C. B. 515; Alston *v.* Grant, 3 Ell. & Bl. 128; Bonomi *v.* Backhouse, 1 Ell. Bl. & Ell. 622.

(*f*) 3 Bl. Com. 218, citing F. N. B. 184.

injury to the sufferer (*i*). And it appears to be settled that no action is maintainable in respect of an injury (as injurious vibration to a house and the like) consequential on the use of a railway or other undertaking authorized by the legislature (*k*).

The principle of the law is the same with regard to *incorporeal* hereditaments. Thus, it is a nuisance to stop or divert water that ought to run to another's meadow or mill (*l*). And, again, if I have a way, annexed to my estate, across another's land, and he obstructs me in the use of it, either by totally stopping it, or putting logs across it, or ploughing over it, it is a nuisance; for, in the first case, I cannot enjoy my right at all; and in the latter, I cannot enjoy it so commodiously as I ought (*m*). It is, however, as the general rule, a *damnum absque injuriâ* and no nuisance, if a trade similar to my own is set up by another in my neighbourhood (*n*); though it is an actionable nuisance if I am entitled to hold a fair, market or ferry, and another person sets up a fair, market or ferry so near mine that he does me a prejudice (*o*). But in order to make out a nuisance of this species, it is necessary, 1. That my market or fair be the elder, otherwise the nuisance lies at my own door. 2. That the market be erected within the third part of twenty miles from mine. For it is held reasonable that every man should have a market within such a distance,—one-third of a day's journey,—from his own home; so that, the day being divided into three parts, he may spend one part in going, another in returning, and the third in transacting his necessary business there (*p*).

For this injury of nuisance, the party injured may, by

(*i*) See 9 Rep. 58; Chandler *v.* Thompson, 3 Camp. 82; Tapling *v.* Jones, 11 H. of L. 290; Potts *v.* Smith, Law Rep., 6 Eq. Ca. 311; Butt *v.* Imperial Gas Co., ib., 2 Ch. App. Ca. 158.

(*k*) See Hammersmith Rail. Co. *v.* Brand, Law Rep., 4 Eng. & Ir. App. 171.

(*l*) F. N. B. 184.

(*m*) F. N. B. 183.

(*n*) Hale on F. N. B. 184.

(*o*) F. N. B. 184; 2 Roll. Abr. 140. See Dorchester *v.* Ensor, Law Rep., 4 Exch. 335.

(*p*) Bl. Com. vol. iii. p. 210.

action of trespass on the case, recover a satisfaction in damages for the injury sustained (*q*); and he has also, as it may be recollected, the right to *abate* the nuisance by his own act, a subject of which we have already taken sufficient notice (*r*). In many cases, also, the party injured may obtain from the court an injunction to stay or prevent the nuisance, or to enforce its abatement by the wrongdoer himself.

4. The fourth species of injury to real property is *Waste*. This (as explained in a former part of this work) is any spoil and destruction done, or allowed to be done by the tenant, to houses, woods, lands, or other corporeal hereditaments, during the continuance of his particular estate therein (*s*); which the common law expresses very significantly by the word *vastum;* and this waste is either voluntary or permissive; the one a matter of commission, as by pulling down a house, the other of omission only, as by suffering it to fall into ruin by want of necessary reparations. [Whatever does a lasting damage to the freehold or inheritance, is waste. Therefore the removal of a wainscot, floors, or other things once fixed to the freehold of a house, is, generally speaking, waste; though it is held, by way of exception from the ordinary rule, that a tenant who has made erections for the purposes of trade, or has put up ornamental fixtures of a kind removable without material damage, may lawfully remove them (*t*). It has been decided that if a house be destroyed by tempest, lightning, or the like, which is the act of Providence, it is no waste; but otherwise if the house be burned by the carelessness or negligence of the lessee. In both these

(*q*) Among the real actions now abolished, there were two by which the actual removal of the nuisance might be effected, viz., the *assize of nuisance* and the writ of *quod permittat prosternere* (see 3 Bl. Com. 220).

(*r*) Vide sup. p. 244.

(*s*) Vide sup. vol. I. p. 257.

(*t*) See Amos on Fixtures, 138—150.

[cases, however, it is to be understood that a tenant bound by covenant or other express contract to keep the house in repair, is compellable to rebuild, unless the contract was made expressly subject to exception in the event of such inevitable accident. Waste may also be committed in ponds, dove-houses, warrens, and the like, by so reducing the number of the creatures therein, that there will not be sufficient for the reversioner when he comes to the inheritance (*u*). "Timber" also is part of the inheritance (*x*). Oak, ash, and elm are timber in all places; and by the custom of some particular counties, in which other kinds of trees are generally used for building, they also are for that reason considered as timber (*y*); and to cut down timber trees, or top them, or do any other act whereby they may decay, is waste (*z*). But "underwood," the tenant may cut down at any seasonable time that he pleases (*a*); and he may also, of common right, take sufficient *estovers* (*b*), unless restrained (as is usual) by particular covenants or exceptions (*c*). Again, the conversion of land from one species to another, is waste. Thus to convert wood, meadow, or pasture, into arable; to turn arable, meadow, or pasture, into woodland; or to turn arable or woodland into meadow or pasture, are all of them waste (*d*). For, as Sir Edward Coke observes, when such a close, which is conveyed and described as pasture, is found to be arable, and *è converso*, it not only changes the course of husbandry, but the evidence of the estate (*e*). And the same rule is observed, for the same reason, with regard to converting one species of *edifice* into another, even though it is thereby improved in its value (*f*). Moreover, to open land to search for mines of metal, coal, and the like, is

(*u*) Co. Litt. 53.

(*x*) 4 Rep. 62.

(*y*) As to *willows*, see Phillips *v.* Smith, 14 Mee. & W. 589. As to *beech* trees, see Matthews *v.* Matthews, 7 C. B. 1018.

(*z*) Co. Litt. ubi sup.

(*a*) 2 Roll. Abr. 817.

(*b*) Vide sup. vol. I. p. 256.

(*c*) Co. Litt. 41.

(*d*) Lord Darcy *v.* Askwith, Hob. 296.

(*e*) Co. Litt. 53.

(*f*) Cole *v.* Green, 1 Lev. 309.

[waste; for it is a detriment to the inheritance (*g*); but if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use (*h*); for it is now become the mere annual profit of the land.] In general, any acts or neglects hurtful to the inheritance are wrongful on the part of a tenant who has an estate less than the inheritance (*i*). But a tenant in fee, whether fee-simple or fee-tail, is not impeachable for waste: nor is a tenant in tail, even after possibility of issue extinct, because his estate was at its creation an estate of inheritance. And the same doctrine has obtained in the courts of law in reference to an estate *for life* limited with such words. But even in these cases the tenant has been always restrained by a court of equity from any manifest injury to the inheritance (as by pulling down a house and the like); and it forms one of the provisions of the "Judicature Act, 1873," that "whereas it is expedient to take occasion "of the union of the several courts whose jurisdiction is "transferred thereby to the High Court of Justice to "amend and declare the law to be thereafter administered "in certain matters," an estate for life, without impeachment of waste, shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate (*k*). The law, however, does not regard any act by whomsoever committed, as amounting to waste, unless there be some substantial and considerable damage (*l*); and therefore in a case where the damage done was found to be less than forty pence, judgment was given for the defendant (*m*).

(*g*) 5 Rep. 12.

(*h*) Lord Darcy *v.* Askwith, Hob. 296.

(*i*) Vide sup. vol. I. p. 257.

(*k*) 36 & 37 Vict. c. 66, s. 25, subsect. (3). Vide sup. vol. I. p. 257, n. (*t*).

(*l*) Doe *d.* Grubb *v.* Lord Burlington, 5 B. & Ad. 507.

(*m*) See the Governors, &c. of Harrow School *v.* Alderton, 2 Bos. & Pul. 86. Waste, properly so called, is an injury sustained by the reversioner or remainder-man on a par-

The remedy for waste is either by injunction in case of impending or continuing waste, or else by action on the case against the wrong-doer, to recover such damages as a jury may award (*n*). And such action or injunction may be had not only against the tenant, but against any stranger by whom an act has been wrongfully committed, by which the premises have been damaged (*o*); and it will lie at the suit of one joint tenant, or tenant in common, against another who has destroyed the subject of joint or common property (*p*). We may also remind the reader that an analogous action on the case—called in this instance an action for *dilapidations*,—may be maintained by a rector or vicar against his predecessor, or the executors of his predecessor, (and this for *permissive* as well as *voluntary* waste,) it being held that the incumbent of a

ticular estate. The term occurs, however, occasionally, in the books, in a somewhat different sense. Thus when there is a person having common of estovers in any place, and the owner of the wood demolishes the whole wood and thereby destroys all possibility of taking estovers,—this is described as a species of waste on the part of such owner. (See 3 Bl. Com. p. 224.)

(*n*) Prior to the provisions of 3 & 4 Will. 4, c. 27, for abolition of real and mixed actions, there was also the mixed action of *waste*, by which (see 6 Edw. 1, c. 5) both the demised premises and damages for the waste might have been recovered; and in aid of which there was also the writ of *estrepement*, to prevent the commission of the injury *pendente lite*. But in later times this action had become for the most part supplanted by the personal action of trespass on the case (for the reasons of which change, see Co. Litt. 53 b, 54 a, 218 b; 2 Saund. by Wms. 252, n. 7); and the object of the writ of *estrepement* was effected by an application for an injunction. It may also be observed, that, by our more antient law, waste was not punishable in any tenant except guardian in chivalry, tenant in dower and tenant by the curtsey; and that these were punishable only by way of damages (2 Inst. 146), except in the case of a guardian;—and he forfeited his wardship by the provisions of the Great Charter (2 Inst. 300). But the 6 Edw. 1, c. 6, inflicted forfeiture and treble damages in the case of waste committed by a tenant in dower, by the curtesy, for life, or years.

(*o*) Accordingly, if my house or premises be injured by a fire caused by the negligence of a neighbour, he may be sued by me for the damage he has thereby occasioned. (See Filliter *v.* Phippard, 11 Q. B. 347.)

(*p*) 1 Chit. Gen. Pr. 272.

living is bound to keep the parsonage house and chancel of the church in good and substantial repair; restoring and rebuilding where necessary, according to the original form (*q*).

5. *Subtraction* is another species of injury affecting a man's real property; and it happens when any person who owes any suit, duty, custom, or other service to another withdraws or neglects to perform it (*r*). And these consist in general of *fealty, suit of court, rent, and customary services.*

Fealty and suit of court are among the conditions upon which the antient lords granted out their lands to their feudatories; and consisted in the obligation on the part of those tenants to take the oath of fealty to the lord, and attend and follow his courts by serving on juries there (*s*): and of the same nature also are such *rents* as fall under the legal denomination of rent service (*t*); these being the stated returns due, either by antient or modern reservation, from the tenant to his lord,—whether in provisions, arms, or the like, or in money: to which last almost all rents are now reduced. And the subtraction or non-observance of any of these conditions of grant, is an injury to the freehold of the lord, by diminishing the value of his seigniory. Besides which, there arises whenever *rent* becomes due, (whatever may be its nature, and whether it is connected with the tenure or not,) a *debt* between the parties; the non-payment of which is a pecuniary injury, independent of the wrong done to the freehold (*u*).

For the withholding of fealty and suit of court, and in general for all rents, there is the peculiar remedy by distress; of which we have already treated (*v*); and it

(*q*) As to this action, vide sup. vol. II. p. 713.

(*r*) 3 Bl. Com. 230.

(*s*) As to fealty, vide sup. vol. I. pp. 177, 246, 256, 626.

(*t*) As to rent service, vide sup. vol. I. p. 673.

(*u*) As to debt, vide sup. vol. II. p. 142.

(*v*) As to a distress, vide sup. p. 245.

is the only remedy at the common law, for the two first of these. But to recover rent there is also a remedy by action (*x*), the nature of which will be more particularly explained, when we arrive at the consideration of that species of injury which consists of breach of contract.

[As to *customary services;* the one of most frequent occurrence is that of doing suit to another's mill: where the persons, resident in a particular place, by usage, time out of mind, have been accustomed to grind their corn at a certain mill (*y*). If under such circumstances, any of them go to another mill and withdraw their suit (their *secta, à sequendo*) from the antient mill, this is not only a damage, but an injury to the owner; because this custom might have a very reasonable foundation; viz. the erection of such mill by the ancestors of the owner for the convenience of the inhabitants, on condition that when erected, they should grind their corn there only. And, for this injury, the owner may recover damages in an action on the case (*z*).]

6. The last species of injuries to real property—which, in some instances, amounts also to the injury of *nuisance*, of which we have already treated—is that of *disturbance;* which is the wrongful obstruction of the owner of an

(*x*) Formerly there were several *real* actions (now abolished by 3 & 4 Will. 4, c. 27) to recover rent in arrear, viz., the assize of *mort d'ancestor* and of *novel disseisin*, the writ *de consuetudinibus et serritiis*, and the writ of right *sur disclaimer*. (See as to these, 3 Bl. Com. 148, 232; Roscoe on Real Actions, 31, 32, 63, 75.) On the other hand there were also real actions to redress the oppressions of the lord; as the writ *ne injustè vexes*, and writ of *mesne*. (See as to these, 3 Bl. Com. 284; Roscoe on Real Actions, 37, 38.)

(*y*) As to this service or custom, see Harbin *v.* Green, Hob. 233; Drake *v.* Wigglesworth, Willes, 654.

(*z*) This action has been resorted to in modern times (see Vyvyan *v.* Arthur, 1 B. & C. 410; Richardson *v.* Walker, 2 B. & C. 827.) Formerly the person injured was enabled to compel the specific performance of the service withdrawn, by the writs (all now abolished) *de sectâ ad molendinum, ad furnum, ad torrale*, and the like. (F. N. B. 123; Roscoe on Real Actions, 36.)

incorporeal hereditament, in its exercise or enjoyment: and we shall mention five sorts of this injury,—disturbance of *franchise;* disturbance of *common;* disturbance of *ways;* disturbance of *tenure;* and disturbance of *patronage.*

[Disturbance of *franchise* happens when a man who has any species of franchise, as of holding a court leet, of keeping a fair or market, of free warren, of taking toll, of seizing waifs or estrays, or (the like), is disturbed or incommoded in the lawful exercise thereof. As if another, by menaces or persuasions, prevails upon the suitors not to appear at my court; or obstructs the passage to my fair or market (*a*); or hunts in my free warren; or refuses to pay me the accustomed toll; or hinders me from seizing the waif or estray, whereby it escapes or is carried out of my liberty: in every case of this kind, all which it is impossible here to recite or suggest, there is an injury done to the legal owner: his property is damnified, and the profits arising from such his franchise are diminished. To remedy which, he is entitled to sue for damages by an action on the case, or, in case of the refusal to pay toll, may take a distress if he pleases (*b*).

The disturbance of *common* comes next to be considered —where any act is done by which the right of another to his right of common is incommoded or diminished (*c*). This may happen, 1. Where one who hath no right of common puts his cattle into the land; and thereby robs the cattle of the commoners of their respective shares of the pasture. Or if one who hath a right of common, puts in cattle which are not commonable, as hogs and goats; which amounts to the same inconvenience. But the lord of the soil may, by custom or prescription, (but not without,) put a stranger's cattle into the common (*d*);

(*a*) See Dorchester *v.* Ensor, Law Rep., 4 Exch. 335.

(*b*) Heddy *v.* Wheelhouse, Cro. Eliz. 558.

(*c*) As to common, vide sup. vol. I. p. 649.

(*d*) 1 Roll. Ab. 396.

[and also, by a like prescription for common appurtenant, cattle that are not commonable may be put into the common (*e*). In general, however, if the beasts of a stranger, or the uncommonable cattle of a commoner, be found upon the land, the lord, or any of the commoners, may drive them off, or distrain them *damage feasant* (*f*); or the commoner may bring an action on the case, (or the lord, an action of trespass,) to recover damages. 2. Another disturbance of common is by surcharging it; or putting more cattle therein than the pasture and herbage will sustain, or the party hath a right to do. In this case he that surcharges does an injury to the rest of the owners, by depriving them of their respective portions, or at least contracting them into a smaller compass. This injury by surcharging can, properly speaking, only happen where the common is appendant or appurtenant, and of course limitable by law, or where, when in gross, it is expressly limited and certain; for where a man hath common in gross, *sans nombre*, or *without stint*, as it is more commonly called, he cannot be a surcharger. However, even where a man is said to have common without stint, still there must be left sufficient for the lord's own beasts; for the law will not suppose that at the original grant of the common the lord meant to exclude himself (*g*). The usual remedies for surcharging the common are either by distraining so many of the beasts as are above the number allowed, or else by an action of trespass, both which may be had by the lord; or, lastly, by action on the case, in which any commoner may be plaintiff, and that as well against the lord, as against another commoner (*h*). 3. In addition to the above, there is another disturbance

(*e*) Co. Litt. 122.

(*f*) 9 Rep. 112.

(*g*) 1 Roll. Ab. 399.

(*h*) Freem. 273; 1 Saund. by Wms. 346, n. (2). Until the general abolition of real actions, there was also the *writ of admeasurement of pasture*; as to which see F. N. B. 126.

[of common, when the owner of the land, or other person, so incloses or otherwise obstructs it (*i*), that the commoner is precluded from enjoying the benefit to which he is by law entitled (*k*). This may be done either by erecting fences, or by driving the cattle off the land, or by ploughing up the soil of the common (*l*).] Or it may be done by erecting a warren therein, and stocking it with rabbits in such quantities that they devour the whole herbage, and thereby destroy the common; though, on the other hand, the lord may lawfully erect a warren, provided the rabbits do not increase so as to occasion this inconvenience (*m*). For each of these injuries the commoner may have his action of trespass on the case (*n*), and, in certain instances,—as where the obstruction is occasioned by a fence or wall,—he may *abate* it, or throw it down, or obtain an injunction against the wrongdoer (*o*).

[The third species of disturbance, that of *ways*, is very similar in its nature to the last, and it principally happens when a person who hath a right of way over another's

(*i*) By 38 Geo. 3, c. 65, to depasture commons, &c. with *diseased sheep*, was made an offence punishable with a pecuniary penalty before a justice of the peace; and there is a similar provision in 11 & 12 Vict. c. 107, s. 2.

(*k*) It is to be remembered, however, that the lord, or other proprietor of the waste, may *approve*, that is, inclose the land, and convert it to the uses of husbandry, provided he leaves sufficient common to the tenants, according to the proportion of their land. As to this vide sup. vol. I. p. 655.

(*l*) Leverett *v.* Townshend, Cro. Eliz. 198. It seems difficult to distinguish this disturbance of common from the particular species of *waste*, to which reference is made, sup. p. 407, n. (*m*).

(*m*) See Bellew *v.* Langdon, Cro. Eliz. 876; Hadesden *v.* Gryssel, Cro. Jac. 195; Hassard *v.* Cantrell, Lutw. 108; 3 Bl. Com. 237.

(*n*) Before the abolition of real actions, he was also entitled to the writ of *novel disseisin* or *quod permittat;* as to which, see 3 Bl. Com. p. 22; Roscoe on Real Actions, p. 40.

(*o*) 1 Saund. by Wms. 353 a. The commoner, however, cannot cut down trees wrongfully planted by the lord, or kill his rabbits destroying the common, or even fill up the coney-burrows; but his remedy is by action or injunction only. (Ibid.)

[grounds is obstructed by inclosures or other obstacles, or by ploughing across it: by which means he cannot enjoy his right of way, or at least not in so commodious a manner as he might have done. Here, also, the remedy is by action on the case, or by abating the obstruction or by obtaining an injunction.

The fourth species of disturbance is that of *tenure*, or breaking that connection which subsists between the lord and his tenant, and to which the law pays so high a regard, that it will not suffer it to be wantonly dissolved by the act of a third person. To have an estate well tenanted is an advantage that every landlord must be very sensible of; and therefore the driving away of a tenant from off his estate is an injury of no small consequence. So that if there be a tenant at will of any lands or tenements, and a stranger, either by menaces and threats, or by unlawful distresses, or by fraud and circumvention, or other means, contrives to drive him away, or inveigle him to leave his tenancy, this the law very justly construes to be a wrong and injury to the lord, and gives him a reparation in damages against the offender by an action on the case (*p*).

The fifth species of disturbance,—and by far the most considerable,—is that of disturbance of *patronage;* which is to hinder or obstruct the patron in the presentation of his clerk to a benefice (*q*).

This injury was distinguished at common law from another species of injury, in regard to an advowson, called *usurpation;* which happens when a stranger that hath no right presenteth a clerk, and he is thereupon admitted and instituted (*r*); in which case of usurpation the patron, by the common law, was absolutely ousted and dispossessed, and lost, not only his turn of presenting *pro hâc vice*, but also the absolute and perpetual inheritance of the advow-

(*p*) See Hal. Anal. c. 40; 1 Roll. Ab. 108.

(*q*) As to patronage, or the right of presentation to benefices, vide sup. vol. II. p. 684.

(*r*) Co. Litt. 277. As to admission and institution, vide sup. vol. II. p. 686.

[son; so that he could not present again upon the next avoidance, unless in the meantime he recovered his right by a real action, viz., a *writ of right of advowson* (*s*). The reason given for his losing the present turn, and not being able to eject the usurper's clerk, was, that the final intent of the law in creating this species of property being to have a fit person to celebrate divine service, it preferred the peace of the church (provided a clerk were once admitted and instituted) to the right of any patron whatever.] And the patron also lost the inheritance of his advowson, unless he recovered it in a writ of right, because by such usurpation,—and consequent fulness or *plenarty* (as it was called) of the church by the act of the usurper,—his own possession of the advowson was considered as displaced; and the law allowed no remedy, either by presentation or possessory action, nor otherwise than by a writ of right, to a person put out of possession of an hereditament of this description. The only remedy therefore which the patron had left, was to try the mere right in a writ of *right of advowson*. Thus stood the common law.

[But bishops in antient times, either by carelessness or collusion, frequently instituting clerks upon the presentation of usurpers, and thereby defrauding the real patrons of their right of possession, it was in substance enacted by the statute of Westminster the second, 13 Edw. I. c. 5, s. 2, that if the possessory action of *quare impedit* (*t*) should be brought within six months after the avoidance, the patron should, notwithstanding such usurpation, recover that very presentation; and this recovery

(*s*) 6 Rep. 49; F. N. B. 30. This was a peculiar writ of right framed for this special purpose, but in every other respect corresponding with other *writs of right*, as to which vide sup. p. 392.

(*t*) The statute of Edw. I. gave a similar efficacy to another possessory action, called an assize of *darrein presentment*, which was one of those abolished by 3 & 4 Will. 4, c. 27, s. 36. This action lay only where a man had an advowson by descent from his ancestors; but a *quare impedit* was (and is) equally available whether a man claims title by descent or by purchase. (3 Bl. Com. 245.)

[gave back to him the seisin of the advowson. Yet, even after this provision, if the true patron omitted to bring his action within six months, the seisin was gained by the usurper, and the patron, to recover it, was still driven to the long and hazardous process of a writ of right. To remedy which, it was further enacted by statute 7 Ann. c. 18, that no usurpation should displace the estate or interest of the patron, or turn it to a mere right; but that the true patron might present, upon the next avoidance, as if no such usurpation had happened (*u*). So that the title of usurpation is now much narrowed, and the law stands upon this reasonable foundation,—that if a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church, and as a punishment for my own negligence; but that turn is the only one I shall lose thereby. Usurpation now gains no right to the usurper with regard to any future avoidance, but only to the present vacancy; it cannot indeed be remedied after six months are past; but during those six months it is only a species of disturbance, and, within that time, may be remedied by bringing a *quare impedit.*]

The above-mentioned remedy by *quare impedit* is now therefore the only action used in any case of the disturbance of patronage; and the course of proceeding in it will hereafter be considered in its proper place (*x*). At present we shall only notice the circumstances by which it is usually preceded.

[Upon the vacancy of a living, the patron, we know, is bound to present within six calendar months, otherwise it will lapse to the bishop (*y*). But if the presentation be made within that time, the bishop is bound to admit and institute the clerk if found sufficient; unless the church be full, or there be notice of any litigation. For if any oppo-

(*u*) As to this statute, see Robinson *v.* Marquis of Bristol, 20 L. J. (C. P.) 208.

(*x*) Vide post, bk. v. c. xi.

(*y*) Vide sup. vol. ii. p. 717.

[sition be intended, it is usual for each party to enter a *caveat* with the bishop, to prevent his institution of his antagonist's clerk. An institution after a *caveat* entered, is void by the ecclesiastical law; but this the temporal courts pay no regard to, and look upon a *caveat* as a mere nullity (*z*). But if two presentations be offered to the bishop upon the same avoidance, the church is then said to become *litigious;* and if nothing further be done, the bishop may suspend the admission of either, and suffer a lapse to occur. Yet if the patron or clerk on either side request him to award a *jus patronatûs*, he is bound to do it. A *jus patronatûs* is a commission from the bishop, directed usually to his chancellor and others of competent learning; who are to summon a jury of six clergymen and six laymen, to inquire into and examine who is the rightful patron; and if, upon such inquiry made and certificate thereof returned by the commissioners, the bishop admits and institutes the clerk of that patron whom they return as the true one, he secures himself at all events from being a disturber, whatever proceedings may be had afterwards in the temporal courts (*a*).

The clerk refused by the bishop may also have a remedy against him in the spiritual court, denominated a *duplex querela* (*b*); which is a complaint in the nature of an appeal from the ordinary to his next immediate superior; as from a bishop to the archbishop: and if the temporal court adjudges the cause of refusal to be insufficient it will grant institution to the appellant (*c*).

Thus far matters *may* go on in the ecclesiastical court; but in contested presentations they seldom go so far. For upon the first delay or refusal of the bishop to admit his clerk, the patron usually brings his *quare impedit* for

(*z*) Hitching *v.* Glover, 1 Roll. Rep. 191.

(*a*) 1 Burn, 24.

(*b*) Ibid. 159.

(*c*) The appeal on a *duplex querela* from the archbishop's court, is to the Judicial Committee of the Privy Council. (Gorham *v.* Bishop of Exeter, 15 Q. B. 52. See 86 & 37 Vict. c. 66, s. 21.)

[the temporal injury done to his property, in disturbing him in his presentation. For the patron is always plaintiff in this action, and not the clerk; as the temporal law supposes the injury to be offered to the former only, by obstructing or refusing the admission of his nominee, and not to the latter, who hath no right in him till institution, and of course can suffer no injury. But as to the parties *against* whom the action is to be brought, it is to be observed that all these three persons, the pseudo-patron, his clerk, and the ordinary, may be disturbers of a right of advowson: the pretended patron by presenting to a church to which he has no right, and thereby making it litigious or disputable; the clerk by demanding or obtaining institution, which tends to and promotes the same inconvenience; and the ordinary by refusing to admit the real patron's clerk, or admitting the clerk of the pretender. Accordingly, if the delay arises from the bishop alone, as upon pretence of incapacity or the like, then he only may be named as defendant; if there be another presentation set up, then the pretended patron and his clerk must be joined in the action; or it may be brought against the patron and his clerk, leaving out the bishop, or against the patron only. However, it is most advisable to bring it against all three. For if the bishop be left out, and the suit be not determined till the six months are past, he is entitled to present by lapse; as he is not party to the suit (*f*); but if he be named, no lapse can possibly accrue till the right is determined. Again, if the false patron be left out, and the writ be brought only against the bishop and the clerk, the suit is of no effect, and the writ shall abate; for the right of the patron is the principal question in the cause (*g*). And if the clerk be left out, and has received institution before the action brought (as is sometimes the case), the patron by this suit may recover his right of patronage, but not the pre-

(*f*) Lancaster *v.* Lowe, Cro. Jac. 93.

(*g*) 7 Rep. 25; Elvis *v.* Archbishop of York, Hob. 322.

[sent turn; for he cannot have judgment to remove the clerk, unless he be made a defendant and party to the suit, to hear what he can allege against it. For which reasons it is the safer way to insert all three in the writ (*h*).]

Finally, we may remark, that though in a *quare impedit* the patron only, and not the clerk, is allowed to sue the disturber, yet there is one species of presentation in respect of which a remedy, to be sought in the temporal courts, is put, by statute, into the hands of the clerk presented, as well as of the owners of the advowson; and this is in the case of a presentation to a benefice belonging to a Roman Catholic patron, which (according to the place in which it is situate) becomes vested by law in the University of Oxford or of Cambridge (*i*). [For in such case, besides the action of *quare impedit* which the university is entitled to bring as patron, it was provided, by 12 Anne, st. 2, c. 14, s. 4, that either the university or the clerk presented by them shall be at liberty to take proceedings in equity against any person presenting to such livings and disturbing their right of patronage,—or against his *cestui que trust*, or any other person whom they have cause to suspect,—in order to compel a *discovery* of and secret trusts for the benefit of Papists, in evasion of those laws whereby this right of advowson became vested in these learned bodies (*j*): and also (by the stat. 11 Geo. II. c. 17) to compel a discovery whether any grant or conveyance, said to be made of such advowson, was made *bonâ fide* to a Protestant purchaser for the benefit of Protestants, and for a full consideration; without which requisites every such grant and conveyance of any advowson or avoidance is absolutely null and void. This is a particular

(*h*) 3 Bl. Com. 248. Blackstone's remarks here seem not to be affected by the circumstance, that a *quare impedit* is now commenced by an ordinary writ of summons. (See 23 & 24 Vict. c. 126, s. 26; 36 & 37 Vict. c. 66, sched. rr. 2, 3.)

(*i*) Vide sup. vol. II. p. 716.

(*j*) In the "Revised Statutes," this Act is printed as 13 Anne, c. 13.

[law, and calculated for a particular purpose; and in no instance but this, does the temporal law permit the clerk himself to interfere in recovering a presentation of which he is afterwards to have the advantage.]

We are next to consider the injuries to *personal* property (*k*); and this, first, as regards things in *possession*; next, things in *action* (*l*).

First, the rights of personal property in *possession*, are liable to two species of injuries: the amotion or deprivation of that possession; and the abuse or damage of the chattels, while the possession continues in the legal owner. The former, or deprivation of possession, is also divisible into several branches—such as the taking them away unlawfully—their unlawful detention, though the original taking might be lawful—and such tortious acts as subject the owner to the loss of them, though the wrong-doer himself may be guilty neither of caption nor detainer. Our present subject will therefore involve four several heads:—1, the injury of unlawfully taking chattels from the owner; 2, that of unlawfully detaining them from him; 3, that of unlawfully depriving him of them, by means other than detention; 4, that of doing damage to them while in his possession.

1. And, first, of an unlawful *taking*. The nature of this requires no illustration, and our attention therefore is to be chiefly directed to its remedy. The first remedy we shall notice is that of procuring the restitution of the goods themselves, together with damages for the loss sustained by their unjust invasion; and this is effected by action of *replevin*, an institution which the Mirrour ascribes to Glanvil, chief justice to King Henry the second (*m*). This action is seldom resorted to in practice, but in one instance of an unlawful taking,—viz. that of

(*k*) Vide sup. p. 385.

(*l*) As to this distinction, vide sup. vol. II. p. 11.

(*m*) 3 Bl. Com. p. 145.

a wrongful distress (*n*); and it is always preceded by an application on the part of the owner, to the proper authority, to cause the goods taken to be *replevied* (*o*); that is, re-delivered to the owner, upon his giving such security as the law requires for trying the legality of the distress. An application for this purpose used formerly to be made in the county court which is incident to the jurisdiction of the sheriff (*p*); but by the Acts establishing and regulating the modern courts of the same name (*q*), it is now to be made to the Registrar of one of *those* courts, viz. that one within the district of which the distress was taken (*r*). The Registrar, on receiving this application, causes the goods to be replevied accordingly by an officer of the court, and delivered to the owner on his giving security, of such amount as mentioned in the Acts, that he will commence in the county court an action of replevin against the distrainor, within one month from the date thereof: that he will prosecute such action with effect and without delay; and that he will make return of the goods, if in the result a return of the same shall be adjudged (*s*). The owner, (or replevisor,) is also entitled, however, at his option, to give security to commence such action in the superior court instead of the inferior jurisdiction; but in this case the security must be conditioned that he will do so within one week (instead of one month) from its date, and not only that he will prosecute the same with effect and without delay, and make return of the goods if a return shall be adjudged,—but also that, (unless he obtains judgment in such action by default,) he will prove before the superior

(*n*) As to other cases of wrongful taking in which replevin will lie, see Co. Litt. 145 b; Vin. Ab. Replevin (B.); Com. Dig. Action (M. 6); George *v.* Chambers, 11 Mee. & W. 149; Morrell *v.* Martin, 3 Man. & Gr. 581; Mellor *v.* Leather, 1 Ell. & Bl. 619.

(*o*) Vide sup. p. 256.

(*p*) Vide sup. p. 282.

(*q*) Vide sup. p. 283.

(*r*) See 9 & 10 Vict. c. 95, s. 119; 19 & 20 Vict. c. 108, ss. 63, 64; 23 & 24 Vict. c. 126, s. 22.

(*s*) 19 & 20 Vict. c. 108, s. 66; County Court Rules and Orders, 1867, Sched. of Forms, No. 156.

court that he had good ground for believing, either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair, or franchise, was in question; or that the rent or damage, in respect of which the distress was made, exceeded 20*l.* (*t*). Security in one or other of these forms having been given, the replevisor proceeds accordingly to commence his action of replevin either in the county or superior court, as the case may be: but if he brings it in the former, it may be *removed*, by the defendant, (or distrainor,) into the superior court by writ of *certiorari*. To obtain such writ the defendant must apply to the superior court or to a judge thereof, and must give security, (not exceeding £150,) to defend such action with effect, and—unless the replevisor shall discontinue, or shall not prosecute such action, or become nonsuit therein—to prove before the superior court that he, the defendant, had good ground for believing to the effect already set forth in the case of an action brought in the superior court by the replevisor (*u*). And so much, for the present, with respect to the action of replevin:—the subsequent progress of which in the superior court (and that in the county court is precisely analogous) will be explained hereafter (*x*).

(*t*) 19 & 20 Vict. c. 108, s. 65; County Court Rules and Orders, 1867, Sched. of Forms, No. 155.

(*u*) 19 & 20 Vict. c. 108, s. 67.

(*x*) Vide post, c. XI. It has been thought undesirable to encumber the text with any statement of the law of replevin by the act of the sheriff, as it existed before the introduction of the county courts in the year 1846. But the following notices of it may be useful.

By the old common law, the only remedy for the party wishing to replevy his goods was by a writ of *replegiari facias*, issuing out of Chancery, and commanding the sheriff to replevy. Afterwards by 52 Hen. 3, c. 21; 13 Edw. 1, c. 2; 1 Ph. & M. c. 12; and 11 Geo. 2, c. 19,—the sheriff was directed, for the more speedy relief of the owner, to replevy without writ, upon his levying a plaint and finding *plegii de prosequendo*, and also *de retorno habendo* in the event of the right being determined against him; and (in case of rent) security also to prosecute the suit with effect and without delay. Either party, however, might remove the plaint from the county court to one of the superior courts of law by writ

[Another action for the unlawful taking of a man's goods, and one of much more extensive use, being applied to every injury of that description, is the action of trespass (*y*). As if a man takes the goods of another out of his actual or virtual possession, without having a lawful title so to do, it is an injury, which (though it doth not amount to felony unless it be done *animo furandi*) is a transgression, for which an action of trespass will lie; and herein the plaintiff shall not recover the thing itself, but only damages for the loss of it. Or the party aggrieved may, at his choice, have another remedy in damages, by action of trover and conversion, of which more will presently be said.

2. Deprivation of possession may also be by an unjust *detainer* of another's goods, although the original taking was lawful. As if I distrain another's cattle damage feasant, and before they are impounded he tenders me sufficient amends; now though the original taking was lawful, my subsequent detainment of them, after tender

of *recordari*; and as, if any right of freehold came into question, the jurisdiction of the sheriff was at all events at an end, it was usual to remove it in the first instance.

Again in any case of distress, it might happen that the distrainor claimed a property in the goods taken. If he did, the party, distrained upon might sue out a writ *de proprietate probandâ*; which was inquired into before the sheriff prior to any replevin. It might also happen that the distress was carried out of the county, or concealed. In this case the sheriff might return to a writ of *replegiari facias*, that the goods were *eloigned* (*elongata*) to places to him unknown; and thereupon the party distrained upon was to have a writ of *capias in withernam, in vetito* (or, more properly, *repetito*) *namio*; by which the sheriff was commanded to take a second or reciprocal distress, in lieu of the first which was eloigned; so that there was thus distress against distress, one being taken to answer the other, by way of *reprisal*, which seems to be the meaning of the old word *withernam*. And for this reason it was held, that goods taken in *withernam* could not be replevied, until the original distress was forthcoming. (For a fuller exposition of the antient law on these points, see 3 Bl. Com. pp. 147—150.)

(*y*) This action, in other applications of it, has already been considered, vide sup. p. 398.

[of amends, is wrongful, and he shall have an action of replevin against me to recover them (*z*); in which he shall recover damages for the *detention*, though not for the *caption*, because the original taking was lawful. Or, if I lend a man a horse, and he afterwards refuses to restore it, this injury consists in the detaining, and not in the original taking; and the regular method for me to recover possession is by action of detinue (*a*): in which the judgment is conditional that the plaintiff recover the chattel, (or, if it cannot be had, its value,) and also certain damages for detaining the same (*b*).] Formerly the defendant, on this judgment, had his option to redeliver the goods themselves, or else their value, at his pleasure; but now,—in cases where the value is assessed in the verdict,—application may be made by the plaintiff to the court or a judge, for a special writ of execution, under which the chattels detained may be seized, or if they cannot be found, then that the property of the defendant be distrained, till a return be made (*c*). And as one object in the action of detinue is thus to obtain (if possible) specific restitution, so it will not lie for money, corn, or the like; unless it be in a bag or a sack, for then (and not otherwise) it may be distinguishably marked. This form of action was also formerly subject, (as were some other of our legal remedies,) to the incident of *wager of law* (*vadiatio legis*),—a proceeding which consisted in the defendant's discharging himself from the claim on his own oath, bringing with him at the same time into court eleven of his neighbours, to swear that they believed his denial to be true (*d*). This relic of a very antient and

(*z*) F. N. B. 89.

(*a*) Ibid. 138. As to this action, see Jones *v.* Dowle, 9 Mee. & W. 19; Williams *v.* Archer, 5 C. B. 318; Reeve *v.* Palmer, 5 C. B. (N. S.) 84.

(*b*) As to the form of judgment in detinue brought in a *county court*, see County Court Rules and Orders, 1867, Sched. of Forms, No. 160.

(*c*) See 17 & 18 Vict. c. 125, s. 78; Chilton *v.* Carrington, 15 C. B. 730.

(*d*) 3 Bl. Com. 341.

general institution, which we find established not only among the Saxons (*e*) and Normans (*f*), but among almost all the Northern nations that broke in upon the Roman empire (*g*), continued to subsist among us even till the last reign, when it was at length abolished by 3 & 4 Will. IV. c. 42, s. 13 (*h*): and as it exposed plaintiffs in detinue to great disadvantage, it had long had the effect of throwing that action almost entirely out of use, and introducing in its stead the action of trover; which still continues to be the favourite remedy in a case of unlawful detention of goods.

This action of *trover and conversion* is a species of trespass upon the case; and originally lay only for recovery of damages against such person as had *found* another's goods and wrongfully *converted* them to his own use; from which finding and converting, it derived its name. The freedom of this action from wager of law and the less degree of certainty requisite in describing the goods in the declaration (*i*), gave it so considerable an advantage over the action of detinue, that, (by a fiction of law,) the action of trover was at length permitted to be brought against any man, who had in his possession, by any means whatsoever, the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them over when demanded. This fiction consisted in an allegation in the declaration that the plaintiff lost the goods, and that

(*e*) 3 Bl. Com. 343.

(*f*) Gr. Coustumier, c. xxvi.

(*g*) See 3 Bl. Com. 342, where it is observed, that its origin may be traced as far back as the Mosaical law: "If a man deliver unto his "neighbour an ass, or an ox, or a "sheep, or any beast, to keep; and "it die, or be hurt, or driven away, "no man seeing it: then shall an "oath of the Lord be between them "both that he hath not put his "hand unto his neighbour's goods: "and the owner of it shall accept "thereof, and he shall not make it "good."—Exod. xxii. 10.

(*h*) An instance of it occurred in the practice of our courts as lately as in 1824. (King *v.* Williams, 2 Barn. & Cress. 538.) But, in modern times, such an occurrence had been extremely rare.

(*i*) Hartford *v.* Jones, Salk. 654.

the defendant found them,—so as to bring the case within the proper scope of an action of *trover;* and this statement (which was matter of form only, and of which no proof was required) was inserted, although in fact the goods might never have been lost, and might have come to the defendant's possession in some other way, and not by finding. And these formal allegations were retained up to the present times; but by a provision in 15 & 16 Vict. c. 76, ("The Common Law Procedure Act, 1852,") they were directed for the future to be omitted: and it was provided that nothing more need be stated in the declaration, than that the defendant wrongfully converted the goods to his own use; or that he wrongfully deprived the plaintiff of the use and possession of his goods (*k*). Accordingly proof of such conversion or deprivation will now be sufficient to sustain the action. Indeed, it will be enough to prove that the goods belonged to the plaintiff, and came to the defendant's possession, and that he refused or neglected, upon request, to deliver them up; for a refusal to deliver them on request, is, in itself, *primâ facie* sufficient evidence of a conversion (*l*). Under such circumstances, then, and supposing no right to detain them to be established by the defendant, the plaintiff will be entitled to judgment, and damages equal to the value of the thing converted, but not the thing itself, no specific claim of which is made in this form of action (*m*). It is further to be observed, with respect to the remedy of trover, that resort to it is frequently had not only in the case where goods are wrongfully detained upon a lawful

(*k*) See 15 & 16 Vict. c. 76, s. 49, sched. (B.) 28, and Munster *v.* The South-Eastern Railway Company, 4 C. B. (N. S.) 679, *in notis*. Notwithstanding this alteration, it is to be noticed that the action still retains its name of *trover*.

(*l*) 10 Rep. 56. As to what amounts to a conversion, see Green *v.* Dunn, 3 Camp. 215 (n.); Philpott *v.* Kelley, 3 A. & E. 106; Canot *v.* Hughes, 2 Bing. N. C. 448; Granger *v.* Hill, 5 Scott, 561; Caunce *v.* Spanton, 7 Man. & G. 903; Rushworth *v.* Taylor, 8 Q. B. 699; Heald *v.* Carey, 11 C. B. 977; Burroughs *v.* Bayne, 5 H. & N. 296.

(*m*) 3 Bl. Com. 153.

taking, but also where they have been unlawfully taken as well as detained. For though trespass, as we have seen, is a proper form where the injury is founded on a wrongful caption, yet if the owner of the goods chooses to waive that ground of complaint, and to treat the case as one of wrongful detention only, he is at liberty to do so, and thus enable himself to maintain an action of trover; which, for particular reasons of a technical kind, is sometimes found to be a more convenient form than trespass.

3. The injury of dispossessing or depriving another of his personal chattels, may be effected (as already observed) otherwise than by wrongful caption or detainer; and there are various torts,—or in other words, various acts of unlawful commission or omission,—which, though widely differing from each other in their specific nature, are nevertheless reducible under this common head. Thus, I may be deprived either of goods or money from my having delivered over goods, or lent money, in consequence of a representation made by one person, as to the circumstances or character of another. And if such representation was untrue, to the knowledge of the person by whom it was made, it is an injury for which I may maintain against him an action on the case (*n*); and the law is the same in the case of any other injury occasioned by the fraudulent misrepresentation of another (*o*),—as for example if he sells me an infected animal as a sound one (*p*). But such an action is essentially founded on the fraud or deceit of the party charged; and therefore it will not lie in any case where the representation, though untrue in fact, was made *bonâ fide* (*q*). And by

(*n*) See Foster *v.* Charles, 6 Bing. 396; S. C. 7 Bing. 105; Corbett *v.* Brown, 8 Bing. 35; Polhill *v.* Walter, 3 B. & Ad. 114.

(*o*) See Pewtriss *v.* Austen, 6 Taunt. 522; Humphrys *v.* Pratt, 5 Bligh, N. S. 154; Taylor *v.* Ashton, 11 Mee. & W. 401; Behn *v.* Kemble, 7 C. B. (N. S.) 260.

(*p*) Mullett *v.* Mason, Law Rep., 1 C. P. 559.

(*q*) See Haycraft *v.* Creasy, 2 East, 92; Smout *v.* Ilbery, 10 Mee. & W. 1; Ormrod *v.* Huth, 14 Mee. & W. 651; Collins *v.* Evans (in error), 5 Q. B. 820.

Lord Tenterden's Act, (9 Geo. IV. c. 14, s. 6,) no action shall be brought to charge any person by reason of any representation concerning the character, ability or dealings of another, to the intent that such other person may obtain credit, money or goods, unless such representation be made in *writing*, signed by the party to be charged therewith (*r*). Again, I may be deprived of money to which I am entitled under the judgment of a court of law, in consequence of the wrongful omission of the sheriff to seize the goods of the defendant, under the writ of execution which I have sued out upon it. And my remedy is by action on the case against the sheriff (*s*).

4. Besides being deprived of the possession of his personal property, its owner may be injured also by its *abuse and damage:* as by hunting his deer; shooting his dogs; poisoning his cattle; or in anywise taking from the value of any of his chattels, or making them in a worse condition than before, by any of those modes of negligent or wilful mischief which are too obvious to require a more particular detail. And as personal property may, in some instances, be of an intangible or incorporeal nature,—as in the case of a copyright or patent right,—so there are injuries relating to these matters which properly fall under the present head, such as the piracy of a literary composition, or the infringement of a patent (*t*). Of a similar description, too, is the injury committed by one manufacturer who sells goods under the mark of another; even though the latter should have obtained no patent; this being an invasion of his exclusive right to sell in his own name (*u*). Torts, by way of abuse or damage of personal

(*r*) As to what cases are within this section of the Act, see Haslock *v.* Fergusson, 7 Ad. & El. 86; Swan *v.* Phillips, 8 Ad. & El. 457; Pilmore *v.* Hood, 5 Bing. N. C. 97; Devaux *v.* Steinkeller, 6 Bing. N. C. 84; Tatton *v.* Wade, 18 C. B. 371.

(*s*) See Williams *v.* Mostyn, 4 Mee. & W. 145; Guest *v.* Elwes, 5 Ad. & El. 118.

(*t*) As to *copyright*, vide sup. vol. II. p. 34; as to *patent right*, ibid. p. 25.

(*u*) See Sykes *v.* Sykes, 3 Barn. & Cres. 541; Blofeld *v.* Payne, 4 B.

chattels, are redressed either by trespass,—where the act is in itself immediately injurious; or by trespass on the case,—where it is injurious rather in a consequential than a direct sense; according to a distinction that has been referred to in a former place (*v*). But such torts as relate to intangible chattels, are always remediable in the latter form of action only, and are not the proper subjects of an action of trespass. In the case of an infringement of copyright or patent right, or the like, it may also be right to remark in this place, that redress may be sought, not only by an action to recover damages for the injury already suffered, but also by obtaining an *injunction*, restraining the wrong-doer from the further invasion of the right, and compel him to account for the profits already derived from the wrongful sale (*x*).

Hitherto of injuries affecting the right of things personal in *possession*. We are now to consider, secondly, those which regard things in *action* only; or such rights as are founded in and arise from *contracts*, the nature and several divisions of which were explained in the preceding volume (*y*).

Contracts, as we have there seen, are subject to the several distinctions of being either under seal, or by parol; verbal or written; express or implied: and they also comprise many individual species, the principal of which we had formerly occasion to consider in detail. Their violation, in any instance, constitutes that general description of injury known by the name of *breach of*

& Ad. 410; Rodgers *v.* Nowill, 17 L. J. (C. B.) 52; Burgess *v.* Hills, 26 Beav. 244; Leather Cloth Company *v.* American Leather Cloth Company, 11 H. of L. Ca. 523. See also 25 & 26 Vict. c. 88, s. 11.

(*v*) Vide sup. p. 365.

(*x*) As to injunctions against infringement of copyright or patent right, see Barfield *v.* Nicholson, 2 Sim. & Stu. 1; Bailey *v.* Taylor, 1 Russ. & Mylne, 73; Stevens *v.* Benning, 6 De Gex, M. & G. 223; Fox *v.* Hill, 2 De Gex & J. 353; Crookes *v.* Petter, 6 Jur. (N. S.) 1131; Gittins *v.* Symes, 15 C. B. 362.

(*y*) Vide sup. vol. II. pp. 54—144.

contract (*a*): and in general the remedy, where the contract is under seal, is by action of debt or covenant; when it is not under seal, by debt, or by an action on promises —and this, whether such parol or unsealed contract be written or verbal, express or implied (*a*). It may be here expedient, however, to advert in detail to some particular contracts,—consisting principally of those which, from their superior frequency or importance, have attracted our specific notice in former parts of the work. The remedies in these particular cases, may be stated as follows:—

1. As regards the breach of *covenants in leases* (*b*);—for example, of the covenant to repair on the part of the tenant, or that for quiet enjoyment on the part of the landlord,—the remedy for either party is by action of covenant; which is also the proper form in case of the breach of any of those *covenants relating to title*, that are ordinarily contained in conveyances of real estate (*c*). But in case of a covenant in a lease to *pay rent*, upon a lease for years, or other estate less than freehold, the breach of it may be redressed either by action of covenant or of debt; for in this case, the landlord having a claim to a liquidated sum of money, there arises between him and the tenant a debt in point of law (*d*); which debt he may demand, if he thinks proper, in lieu of the more general claim for damages in respect of the breach of covenant. For a freehold rent, indeed, viz. a rent issuing out of a freehold estate, whether of inheritance or for life, no action of debt lay, by the common law, during the continuance of the freehold out of which it issued (*e*); for the

(*a*) It may be here remarked, that it forms one of the provisions of the Judicature Act, 1873, that after the commencement of that Act in November, 1874, stipulations in contracts, *as to time or otherwise*, not deemed in the courts of equity before the passing of that statute to be *of the essence* of the contract, shall receive the same construction and effect in all courts as they would have received theretofore in equity (36 & 37 Vict. c. 66, s. 25).

(*b*) Vide sup. vol. I. p. 514.

(*c*) Vide sup. vol. I. p. 491.

(*d*) Vide sup. vol. II. p. 142.

(*e*) 3 Bl. Com. 232.

action under such circumstances would have been for the recovery of the realty, which was beyond the province of an action merely personal like debt: and it seems that, to this day, no rent of inheritance is recoverable by an action of debt (*f*); but by the statutes 8 Ann. c. 14, and 5 Geo. III. c. 17, such action may now be brought to recover freehold rents if reserved on a lease for life (*g*). Also debt will not lie for arrears of a rent-charge, or an annuity, granted in fee, in tail, or for life, during the continuance of such estate (*h*); but the proper remedy is on covenant. On the other hand, where rent falls into arrear under a parol contract, no action of covenant can be maintained, (that form being exclusively applicable to contracts under seal,)—but debt will lie; and by the statute 11 Geo. II. c. 19, s. 14, the plaintiff may also resort,—though he could not by the common law,—to an action on promises (*i*).

2. Under a contract of *sale* of goods (*k*),—if the vendee complains of a non-delivery of the article sold, a breach of warranty, or the like,—his remedy, where the contract was by parol only, (as is usually the case,) and not by deed, is by an action on promises; and if the vendor complains of non-payment of the price—there being in this case a *debt* between the parties—the remedy is by debt or on promises, at the option of the plaintiff. And if the action be brought for breach of contract to deliver specific goods for a price in money, then, by the effect of a recent enactment (19 & 20 Vict. c. 97, s. 2), the plaintiff may apply for and obtain leave from the judge before whom the cause is tried, that the jury, in finding that he is entitled to recover, shall find also by their verdict what are the goods in respect of which he is so entitled; what sum he would have been

(*f*) Webb *v.* Jigs, 4 Man. & Sel. 113.

(*g*) See 3 Bl. Com. p. 232. As to the remedies for the executors of tenants in fee simple or fee tail, for arrears in his lifetime, see 23 Hen. 8, c. 37, s. 1.

(*h*) Kelly *v.* Clubbe, 8 Brod. & Bing. 130; Bac. Abr. Annuity and Rentcharge.

(*i*) See Brett *v.* Read, Cro. Car. 343; 1 Roll. Abr. 7, l. 23; Naish *v.* Tatlock, 1 H. Bl. 323.

(*k*) Vide sup. vol. II. p. 68.

liable to pay for them, had they been delivered in due course; what damages he will have sustained if the goods shall ultimately be delivered by force of a writ of execution; and what damages, if not delivered at all. And thereupon, in case of judgment for the plaintiff, the court or a judge may order execution to issue for the delivery of the specific goods sold, on payment by the plaintiff of the sum so found to be payable by him, without giving the defendant the option of retaining the goods upon paying the damages assessed; and, in default of delivery, the sheriff shall distrain the defendant by all his lands and chattels, until he deliver the goods, or (at the option of the plaintiff) cause to be made of the defendant's goods the assessed value or damages, or a due proportion thereof.

3. Where upon a contract of *bailment* (*l*), the bailor complains of a failure to redeliver the article, the remedy is (according to the circumstances) by action of detinue, trover, on promises, or on the case for negligence.

4. Where upon a *loan of money* (*m*), the amount is not repaid according to the contract, and there are arrears either on account of principal or interest, the remedy, if the contract be under seal, is debt or covenant; if it be not under seal, then debt or on promises. And here we may take the opportunity of remarking, that there are in the nature of things other pecuniary claims analogous to that for *money lent*, viz. the claim for *money paid* by the plaintiff for the defendant at his request; for money *received* by the defendant, for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff, upon an *account stated* between them (*n*). Indeed it is

(*l*) Vide sup. vol. II. p. 80.

(*m*) Vide sup. vol. II. p. 90.

(*n*) The statements of causes of action referred to in the text, are usually designated as "the common counts." An action, as upon an *account stated*, lies only where the plaintiff and defendant have come to an account, and a balance has been acknowledged; though the simple acknowledgment that a particular sum is due will, without any *further* accounting, be sufficient.

often difficult to determine, upon a given state of facts, into which of these claims the plaintiff's case properly resolves itself. Each of them, however, is the proper subject for an action of debt or on promises.

5. As to the contract of *partnership* (*o*), we have elsewhere remarked, that questions of account between partners, are, as the general rule, settled by proceedings in equity; and, (except in a form of action called account which in modern times has rarely come into use,) are not a proper subject for an action at law (*p*). But an action of debt, on promises, or covenant, (according to circumstances,) may be brought by one partner against the other, on an express agreement to do or forbear from some particular act not involving any question of account (*q*); or on an agreement to pay a liquidated balance or the like (*r*). So, though one partner cannot sue the other, at law, for appropriating to his own exclusive use a chattel of the partnership; yet if one of the partners has destroyed such a chattel, it seems that the other may maintain an action of trespass (*s*).

6. The breach of a contract of *guarantee* (*t*), if contained in an instrument under seal, is redressed by action of debt or covenant; if the contract be not under seal, then by action of debt or on promises. The remedy by the surety against the principal, where the former has been compelled to make a payment under the guarantee, is by debt or on promises, as for money paid by the former to the use of the latter; and any one of several sureties, who has paid more than his rateable proportion, is entitled to claim

(*o*) Vide sup. vol. II. p. 99.

(*p*) Vide sup. vol. II. p. 104. Partnership accounts may, within certain limits as to the sum in dispute, be now dealt with in the *county* court in the exercise of its equitable jurisdiction; vide sup. p. 291.

(*q*) Bedford *v.* Button, 1 Bing. N. C. 391.

(*r*) Chit. Cont. 238; Smith *v.* Barrow, 2 T. R. 476.

(*s*) Co. Litt. 200 a, b; see Bull. N. P. 34; Martyn *v.* Knowllys, 8 T. R. 145.

(*t*) Vide sup. vol. II. p. 105.

contribution from the others, in either of such forms of action (*u*).

7. Upon *bonds* (*x*), the remedy of the obligee, in case of breach of contract by the obligor, is by action of debt only, which is always brought as for the amount of the penalty; but according to the course of practice, as explained in a former part of the work (*y*), the plaintiff is allowed to recover no more upon a bond conditioned for the payment of money, than the principal sum due, with interest and costs; nor (generally) upon a bond conditioned for the performance of any other act, more than shall be assessed by way of damages. The action of debt is also the proper one in regard to all other contracts secured by penalties, if the plaintiff elects to proceed as for the penal sum; but the form of such contracts is in general such as to give him an option of claiming damages, without regard to the penal stipulation; and if the claim be made in this shape, the form of the action is covenant, or on promises, according to distinctions already explained.

8. For breach of contract on a *bill of exchange* or *promissory note* (*z*), the remedy is on promises; or, (where there was a privity of contract between the parties to the suit,) by debt also. Thus the payee, or any indorsee, of a bill or note, may maintain an action on promises against the maker, but only the payee may maintain debt against him. So an action on promises lies against the acceptor of a bill, at the suit of an indorsee, or of the payee, or of a drawer, who has been compelled to take it up; but debt will not lie against him at the suit of any of these parties, except the drawer (*a*).

(*u*) A recent provision in favour of the surety, contained in 19 & 20 Vict. c. 97, s. 5, is noticed, sup. vol. II. p. 107.

(*x*) Vide sup. vol. II. p. 108.

(*y*) Vide sup. vol. II. p. 111.

(*z*) Vide sup. vol. II. p. 114.

(*a*) See Priddy *v.* Henbury, 1 Barn. & Cress. 674; Cresswell *v.* Crisp, 2 Dowl. 635; Kinahan *v.* Palmer, 2 Jones, Ex. Rep. Ireland; Hatch *v.* Trayes, 11 Ad. & Ell. 702; Cloves *v.* Williams, 2 Bing. N. C. 868. *Debt* lies by indorsee against his immediate indorser, Stratton *v.* Hill, 3 Price, 253; Watkins *v.* Wake,

9. Upon a *policy of marine* or *fire insurance* (*b*), the remedy of the assured, in case of breach of contract by the insurer, is by covenant, where the policy is under seal; by an action on promises where it is not. On a policy of *life* insurance (*c*) under seal, the remedy is by debt or covenant; on one not under seal, debt or on promises.

10. And, lastly, upon *charter-parties* (*d*), the form of remedy, in case of breach of contract, is governed by the same distinction with respect to the nature of the instrument, as being sealed or unsealed. In the former case, if the action be brought by the charterer against the owner for not receiving or properly stowing or delivering the cargo, the form is covenant; if by the owner against the charterer, for not supplying a full cargo, it is also covenant; but if for non-payment of freight, it may be either covenant or debt, at the option of the plaintiff. On the other hand, where the charter-party is not under seal, an action on promises must be substituted for covenant in all the before-mentioned cases; and for non-payment of freight, the form of action is debt or on promises, at the option of the plaintiff.

We have now sufficiently considered the injuries which affect such things in action, as arise out of contracts: but there are some things in action which cannot properly be said to have that origin; and the withholding of which will nevertheless constitute an injury, viz. such debts as result from the obligation to pay money pursuant to a sentence of the law, or an enactment of the legislature: as when, in a court of law, judgment is obtained by one man against another, for a specific sum of money; or when by

7 Mee. & W. 488. It was at one time doubted whether debt would lie in any case on a bill or note, unless expressed to be *for value received*. But it is now held, that the omission of these words is not material in that respect. See Chitty on Bills (6th ed.), p. 67.

(*b*) Vide sup. vol. II. pp. 128, 135.

(*c*) Vide sup. vol. II. p. 135.

(*d*) Vide sup. vol. II. p. 140.

an act of parliament of that class called penal, a pecuniary forfeiture is inflicted for committing some specified offence, and made recoverable, as it usually is, either by the Crown, or by the party aggrieved, or by a common informer. We have explained in a former place (*e*), that an obligation or liability to pay a specific sum of money, constitutes a *debt*,—so that the party against whom the judgment is obtained is immediately considered as owing to his adversary the amount awarded; and the party who transgresses the penal statute, as immediately owing to the Crown, to the party aggrieved, or to the common informer, (as the case may be,) the amount of the penalty (*f*). The remedy for the recovery of such debt, or chose in action, when withheld, is by action of debt on the judgment, or on the penal statute, respectively; and in the latter case, this remedy is generally designated as a penal action; or, where one part of the forfeiture is given to the Crown, and the other part to the informer, a *popular* or *qui tam* action, because it is brought by a person *qui tam pro domino rege quam pro se ipso sequitur* (*g*).

III. [With regard to injuries which affect the rights of a man in his *private relations* (*h*); and, in particular, such as may be done to persons under the four following

(*e*) Vide sup. vol. II. p. 143.

(*f*) Blackstone (vol. iii. p. 160) considers the debt, in such cases, as growing out of an implied contract, viz. the original contract entered into by all mankind, who partake the benefits of society, to submit to the constitution of the state of which they are members. But though this seems correctly laid by him and other jurists, as the foundation of the general obligation to obey the law, there is perhaps an unnecessary subtlety in supposing it the basis of the kind of debts in question. It is more natural to consider such debts, as not *founded* upon any contract at all.

(*g*) It may be here noticed that by 22 Vict. c. 32, her Majesty is enabled to remit penalties after conviction, though payable to some party other than the Crown; and also that default in payment of a *penalty* (not in respect of a contract) or of a sum recoverable in a summary way before justices, is excepted from the provision (sect. 2) of the Debtors Act, 1869 (32 & 33 Vict. c. 62), abolishing imprisonment for default in paying money.

(*h*) Vide sup. p. 372.

[relations,—husband and wife; parent and child; guardian and ward; master and servant.

1. The injuries that may be offered to a man, considered as a *husband*, are principally three; *abduction*, or taking away his wife; *adultery*, or criminal conversation with her; and *beating*, or otherwise abusing her.

And, first, *abduction* may be either by fraud and persuasion, or open violence; though the law in both cases supposes force and constraint, the wife having no power to consent; and therefore gives a remedy by action of trespass, *de uxore raptâ et abductâ* (*i*). This action lay at the common law: and thereby the husband shall recover, not the possession of his wife, but damages for taking her away (*j*); and by statute of Westminster the first, (3 Edw. I. c. 13,) the offender may also be imprisoned two years, and be fined at the pleasure of the Crown. Both the Crown and the husband may, therefore, have this action (*k*); and the husband is also entitled to recover damages, in an action on the case, against such as persuade and entice the wife to live separate from him without a sufficient cause (*l*).]

Adultery is not punishable by our law as a crime; its penal correction being left to the spiritual courts, which may proceed against the offender *pro salute animæ* (*m*); but considering it in another aspect, viz. as a grievous civil injury, the law, as it stood up to a recent period, gave satisfaction for it to the husband, by an action for *criminal conversation*. In this action, the damages reco-

(*i*) F. N. B. 89.

(*j*) 2 Inst. 434.

(*k*) 4 Inst. 434.

(*l*) B. N. P. 78. "The old law," says Blackstone (vol. iii. p. 139) "was so strict on this point, that, if "one's wife missed her way upon "the road, it was not lawful for "another man to take her into his "house, unless she was benighted, "and in danger of being lost or "drowned (Bro. Ab. tit. Trespass, "213); but a stranger might carry "her behind him on horseback to "market, to a justice of the peace "for a warrant against her husband, "or to the spiritual court, to sue for "a divorce." (Bro. Ab. ubi sup. 207, 440.)

(*m*) Vide sup. p. 309, n. (*f*).

vered were usually increased or diminished by the circumstances of each particular case (*n*): as the rank and fortune of the plaintiff and defendant; the relation or connection between them; the degree and nature of the seduction employed; the previous behaviour and character of the wife; the manner in which she had been previously treated by the husband; the husband's obligation, by settlement or otherwise, to provide for children probably spurious, and so on (*o*). The damages would also be mitigated where the husband was proved to have been himself first guilty of conjugal infidelity (*p*); and if it appeared, that he connived at or consented to his own dishonour (*q*), or lived, at the time of the adultery, in a state of absolute and permanent separation from his wife, the action would be wholly barred (*r*). It was also a point that deserves remark in reference to the law of this action, that it could not be maintained without proving a marriage in fact,—though, in other cases, reputation and cohabitation are, as the general rule, sufficient evidence of marriage (*s*). But though it will still be useful to recollect these rules, the action for criminal conversation is now abolished, and its place supplied by a different form of proceeding (*t*); it being provided by 20 & 21 Vict. c. 85, s. 33, that a husband may, by petition to the Court of Divorce established by that statute, claim *damages* from any person, on the ground of his having committed adultery with the wife of the petitioner (*u*). It is also provided that such petition shall be served on the alleged adulterer and the wife, unless the court shall dispense

(*n*) B. N. P. 26.

(*o*) 3 Bl. Com. 139.

(*p*) Bromley *v.* Wallace, 4 Esp. 237.

(*q*) See Bennett *v.* Allcott, 2 T. R. 166.

(*r*) See Weedon *v.* Timbrell, 5 T. R. 357.

(*s*) Morris *v.* Miller, Burr. 2057.

(*t*) 20 & 21 Vict. c. 85, s. 59.

(*u*) Accordingly, under the Judicature Act, 1873, after the 2nd November, 1874, the petition will be to the "Probate, Divorce and Admiralty division" of the High Court of Justice established by that Act. (36 & 37 Vict. c. 66, s. 34.)

with such service, or direct some other service to be substituted; and that the claim of damages shall be heard and tried on the same principles and according to the same rules as formerly applied to an action for criminal conversation; and that the damages shall be ascertained in all cases, (as before,) by the verdict of a jury. But the Act also introduces the new principle of giving power to the court to direct, after the verdict has been given, in what manner the damages shall be paid or applied; and to direct that the whole or a part shall be settled for the benefit of the children, (if any,) of the marriage, or as a provision for the maintenance of the wife (*x*).

For the injury of *beating* a man's wife, or otherwise ill-using her, if it be a common assault, battery or imprisonment, the law gives the usual remedy to recover damages by an action of trespass, which must be brought in the names of the husband and wife *jointly:* but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a *separate* remedy, by an action of trespass (*y*), for this ill usage, with an allegation, by way of special damage, that he has lost the benefit of her society, (called an allegation *per quod consortium amisit,*) in which action he shall recover a satisfaction in damages (*z*).

2. With respect to the injury capable of being done to a man in the relation of *parent,* it seems to be now

(*x*) As to this claim for damages in the Divorce Court, see Keats *v.* Montezuma, 1 Swab. & Trist. 334; Bell *v.* Marquis of Anglesey, ibid. 565; Pounsford *v.* Bulpin, 2 Swab. & Trist. 389; Bent *v.* Footman, ibid. 392.

(*y*) By 15 & 16 Vict. c. 76, s. 40, however, the husband may add claims in his own right, in an action brought in the joint names of himself and wife for injuries done to the latter.

(*z*) Guy *v.* Livesey, Cro. Jac. 501; Hide *v.* Scyssor, ibid. 538. As to the case where, by negligence of the defendant, the plaintiff's wife is *killed*, see 9 & 10 Vict. c. 93, sup. p. 370.

clearly established that there is no instance in which an injury can be sustained by a parent in his merely parental character; and that in the case of a battery or other ill-treatment inflicted on a child, the action for redress must in general be brought in the name of the child himself, whether he have attained to his full age or not (*a*). There are cases, indeed, in which the parent is entitled to sue in respect of misconduct towards the child; but as the right of suit attaches to him in all such instances, in the capacity of master, and not strictly in that of parent, the consideration of them will belong more properly to our fourth head.

3. [An injury may be done to a man as a *guardian*, by stealing or ravishing away his ward. For though guardianship in chivalry is now totally abolished, which was the only kind of guardianship beneficial to the guardian, yet the guardian in socage was always, and is still, entitled to an action of ravishment, in the form of trespass, if his ward, or pupil, be taken from him (*b*); but then he must account to his pupil, for the damages which he so recovers (*c*). However a more speedy and summary method of redressing all complaints relative to wards and guardians, is now obtained by an application to Chancery, which hath the superintendent jurisdiction of all the infants in the kingdom (*d*).

4. To the relation between *master and servant*, and the rights accruing therefrom, there are several species of injuries incident. One is retaining a man's hired servant

(*a*) Hall *v.* Hollander, 4 Barn. & Cress. 660. This case may be considered as overruling the opinion to which Blackstone inclined, (vol. iii. p. 141,) that an action may be maintained by a father for the abduction of his child, as well as by a husband for that of his wife.

(*b*) F. N. B. 139.

(*c*) Hale on F. N. B. 139. This action is also given to *testamentary* guardians by 12 Car. 2, c. 24. (See Eyre *v.* Countess of Shaftesbury, 2 P. Wms. 108.)

(*d*) Accordingly, under the Judicature Act, 1873, this jurisdiction will belong to the chancery division of the High Court of Justice established by that Act, on its commencement in November, 1874. (36 & 37 Vict. c. 66, ss. 16, 34.)

[before his time is expired: which, as it is an ungentlemanlike, so it is also an illegal act; for every master has, by his contract, purchased for a valuable consideration the service of his domestics for a limited time: and the inveigling or hiring his servant, which induces a breach of this contract, is therefore an injury to the master; and for this injury the law has given him a remedy by action on the case (*e*); and he may also have an action against the servant for non-performance of his agreement (*f*). But if the new master was not apprized of the former contract, no action lies against *him*, unless, indeed, he refuses to restore the servant upon demand (*g*). Another point of injury is that of beating, confining, or disabling the servant of another, so that he is not able to perform his work: which depends upon the same principle as the last, viz. the property which the master has, by his contract, acquired in the labour of his servant. In this case, beside the remedy of an action of battery or imprisonment, which the servant himself, as an individual, may have against the aggressor, the master also, as a recompense for *his* immediate loss, may maintain an action of trespass, or, at his election, trespass on the case (*h*); in which he must allege and prove the special damage he has sustained by the beating of his servant, *per quod servitium amisit* (*i*); and then the jury will make him a proportionable pecuniary satisfaction (*k*).] It is in this manner, and in this alone, that by our law a parent is enabled to claim redress for a battery, or other ill usage, inflicted on his child; or even for the seduction of his daughter;—viz. as a master, and

(*e*) See Lumley *v.* Gye, 2 Ell. & Bl. 216; Evans *v.* Walton, Law Rep., 2 C. P. 615.

(*f*) F. N. B. 167. See Keane *v.* Boycott, 2 H. Bl. 511; Gunter *v.* Astor, 4 Moore, 12.

(*g*) F. N. B. 167; Winch. 51.

(*h*) Chamberlain *v.* Hazlewood, 5 Mee. & W. 515.

(*i*) 9 Rep. 113; 10 Rep. 130.

(*k*) Blackstone remarks (vol. iii. p. 142) that a similar practice prevailed at Athens; where masters were entitled to an action against such as beat or ill-treated their servants; and he cites Potter's Antiq. l. i. c. 26.

in an action of trespass (or on the case), *per quod servitium amisit;* and, therefore, unless he is able to prove that his child was in his service at the time the injury was committed, he is without remedy (*l*); from which it follows that he is without remedy when the child resided, at the time, with another master, though that master may himself maintain an action (*m*). But where a parent is plaintiff in a case of seduction, the courts incline to relieve him, as much as possible, from any difficulty connected with proof of the loss of service; considering the action as brought *in substance* to repair the outrage done to parental feeling,—and it has been held, therefore, that in such an action, the mere residence of the child with him at the time, affords sufficient proof that the relation of master and servant existed between them (*n*). Upon the same principle, too, the jury is directed, in assessing the damages, to take into account the dishonour done to the plaintiff, as well as the loss of service (*o*); though, on the other hand, they are also bound to pay attention to all such circumstances connected with the behaviour of any of the parties, as tend to lessen the merits of the plaintiff's case. It is further to be remarked, with respect to an action for seduction, that none can be maintained, in any case, by the daughter herself—for *volenti non fit injuria.*

[Such then is the state of the law, (briefly considered,) with respect to injuries resulting from the violation of rights in private relations,—as to which it may be observed in general that notice is only taken of the wrong

(*l*) See Hall *v.* Hollander, 4 Barn. & Cress. 660; Blamire *v.* Hayley, 6 Mee. & W. 55; Grinnell *v.* Wells, 7 Man. & G. 1033; Eager *v.* Grimwood, 1 Exch. 61; Davies *v.* Williams, 10 Q. B. 725; Manley *v.* Field, 7 C. B. (N. S.) 96; Evans *v.* Walton, ubi sup.

(*m*) Irving *v.* Dearman, 11 East, 24; see Thompson *v.* Ross, 5 H. & N. 16.

(*n*) See Jones *v.* Brown, 1 Esp. 217; Maunder *v.* Venn, Moo. & M. 323; Torrence *v.* Gibbens, 5 Q. B. 297; Rist *v.* Faux, 4 B. & Smith, 409.

(*o*) Stark. Ev. part iv. p. 1309.

[done to the superior of the parties related, by the breach and dissolution of either the relation itself, or at least the advantages accruing therefrom: while the loss of the inferior by such injuries is totally unregarded. One reason for which may be this—that the inferior hath no kind of property in the company, care or assistance, of the superior, as the superior is held to have in those of the inferior, and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband. The child hath no property in his father or guardian, as they have in him, for the sake of giving him education and nurture (*p*). And so the servant, whose master is disabled, does not thereby lose his maintenance or wages. He has no interest in his master personally considered. If he receives his part of the stipulated contract, he suffers no injury; and is therefore entitled to no action for any battery or imprisonment which such master may happen to endure.]

IV. The only injuries that remain to be noticed are those sustained by a man in respect of his *public* rights (*q*). This subject, however, will not detain us long, for injuries of this description, between subject and subject, are in general of such a nature as to be remediable, not so

(*p*) Blackstone (vol. iii. p. 142) remarks that the wife or child had nevertheless, if the husband or parent were slain, a peculiar species of *criminal* prosecution allowed them, in the nature of a civil satisfaction, and called an *appeal*. This proceeding, though long since antiquated, was still in force when Blackstone wrote; and was strangely revived in our own days, in the case of Ashford *v.* Thornton (1 Barn. & Ad. 405). It was soon afterwards, however, abolished by statute 59 Geo. 3, c. 46. It may be proper also to remark, in reference to the position in the text that the loss of the inferior, arising from an injury to the superior, is disregarded,—that by a recent alteration in the law, this antient principle is in some degree set aside; for by 9 & 10 Vict. c. 93, the executor or administrator of a party deceased may now bring an action for such injury as shall have caused his *death*; and such action shall be for the benefit of the wife or child, as well as of the husband or parent, of the deceased, as the case may be. (Vide sup. p. 370.)

(*q*) Vide sup. p. 372.

much by action as by indictment; or by some of the prerogative writs, to which we shall have occasion to advert hereafter. Yet there are cases in which an action may be maintained in respect of the violation of public rights; as where a special damage is sustained by an individual, in consequence of the obstruction of a highway (*r*); or where the returning officer at a parliamentary election refuses to receive the vote of an individual, so that the election takes place without his being allowed to exercise his elective right;—in both which injuries the remedy is by action on the case. In the latter of them great difficulty was originally felt in entertaining the action; it being urged on the other side, that the offence was a parliamentary one, and not properly cognizable out of parliament; and also that it involved no private injury that the law could notice. Yet it was ultimately adjudged that an action lay in this case at common law; since the law gave a remedy for every injury, and by this act of the returning officer, the plaintiff was deprived of the greatest privilege of a subject, viz. that of consenting to the laws by which he is bound (*s*). It was further held, that the concurrent jurisdiction of parliament in the matter created no difficulty; particularly as the very grievance which was the subject of complaint, was that the plaintiff was not properly represented there. A somewhat similar description of injury has been since provided for, by a positive enactment of the legislature; for by 31 & 32 Vict. c. 125, s. 48, "if "any returning officer shall wilfully delay, neglect, or "refuse, duly to return any person who ought to be re-"turned to serve in parliament for any county or borough, "such person may, in case it has been determined on the "hearing of an election petition under the Act that such "person was entitled to have been returned, sue the officer

(*r*) Wilkes *v.* Hungerford Market, 2 Bing. N. C. 281.

(*s*) Ashby *v.* White, Ld. Raym. 938. See Pryce *v.* Belcher, 3 C. B. 58; 4 C. B. 866.

" and recover double the damages he shall sustain by " reason thereof, together with full costs of suit; provided " such action is commenced within one year after the " commission of the act on which it is grounded, or within " six months after the conclusion of the trial relating to " such election " (*t*).

(*t*) This is a re-enactment of the 11 & 12 Vict. c. 98, s. 102.

CHAPTER VIII.

OF CIVIL INJURIES COGNIZABLE IN EQUITY.

BEFORE we enter on the subject of the ensuing chapter, viz. the injuries cognizable in the courts of equity, it will be proper to recollect the observations made in a former part of this work on the nature of equity (*a*). Its nature has been there generally explained, and it has been shown to have long constituted a large and important portion of our juridical system—distinct from and suppletory to the common law, and hitherto administered in its own peculiar courts. But it may be important now to enter into some further particulars, tending to throw more distinct light on this subject.

[The very terms of a court of *equity*, and a court of *law*, as contrasted with each other, are apt to confound and mislead us; as if the one judged without equity, and the other was not bound by any law. Whereas every definition or illustration to be met with, which would draw a line between the two jurisdictions, by setting law and equity in opposition to each other,—will be found either totally erroneous, or erroneous to a certain degree.

1. Thus, in the first place, it is said, that it is the business of equity, in England, to abate the rigour of the common law (*b*). And in fact there have been some few instances of its exercising this kind of interposition. But, in general, it contends for no such power. Hard was the case of bond creditors, whose debtor devised away his real

(*a*) Vide sup. vol. I. p. 80. (*b*) Lord Kaims, Prin. of Eq. 44.

[estate. Rigorous and unjust the rule which put the devisee in a better position than the heir (*c*). Yet equity had no power to interpose. Hard also were the rules of the common law that land descended or devised should not be liable to a simple contract debt of the ancestor or devisor —even though such debt were for the money by which the very land had been purchased (*d*): that the father should not succeed, immediately, as heir to the real estate of his son (*e*): and that lands should descend to a remote relation of the whole blood or even escheat to the lord— in preference to the owner's half-brother (*f*). And yet no relief from any of these severities,—though the artificial reasons for them, which arose from feudal principles, had long ago entirely ceased,—could ever be afforded in equity; and it is to the legislature alone, that we owe our deliverance from them. In all cases of positive law, equity, as well as law, must say with Ulpian, "*Hoc quidem perquam durum est, sed ita lex scripta est*" (*g*).

2. Again: it is said that equity determines according to the spirit of the rule, and not according to the strictness of the letter (*h*). But so also does law. Both, for instance, are equally bound and equally profess to interpret statutes according to the true intent of the legislature. In general law, all cases cannot be foreseen; or, if foreseen, cannot be expressed: some will arise that will fall within the meaning, though not within the words of the legislature; and others, which may fall within the letter, may be contrary to its meaning, though not expressly excepted. In reference to such considerations as these, a case (as we elsewhere had occasion to remark,) is sometimes said to fall within the *equity*—or, at other times, to be *out* of the equity—of an act of parliament (*i*). But here by equity, we mean nothing but the sound interpre-

(*c*) Vide sup. vol. I. p. 443.
(*d*) Ibid. p. 434.
(*e*) Ibid. p. 431.
(*f*) Ibid. pp. 421, 422.
(*g*) Ff. 40, 9, 12.
(*h*) Lord Kaims, Prin. of Equity, 177.
(*i*) Vide sup. vol. I. p. 73.

[tation of the law; though the words of the law itself may be too general, too special, or otherwise inaccurate or defective. These, then, are the cases which, as Grotius says, "*lex non exactè definit, sed arbitrio boni viri permittit*" (*k*), in order to find out the true sense and meaning of the lawgiver from every other topic of construction. But there is not a single rule of interpreting a statute that is not equally used both at law and in equity; the construction must in both be the same. Each endeavours to fix and adopt the true sense of the enactment in question; neither can enlarge, diminish, or alter that sense, in a single tittle.

3. But, it hath been said, that *fraud*, and *accident*, and *trust*, are the proper and peculiar objects of equity (*l*). But every kind of *fraud* is equally cognizable, and equally adverted to, at law. In like manner many *accidents* are also supplied at law;—as loss of deeds, mistakes in receipts or accounts, wrong payments, deaths (which make it impossible to perform a condition literally), and a multitude of other contingencies: and some cannot be relieved, even in equity; as, for example, the accident of a devise ill executed. A technical *trust*, indeed, created in land by the limitation of a second use, was forced into the jurisdiction of equity in the manner formerly mentioned (*m*); and this species of trust has ever since remained as a kind of *peculium* in Chancery; which also exercises, in general, an exclusive jurisdiction over trusts of *personal* property. But still there are some trusts which are cognizable at law, as deposits and all manner of bailments; and especially that implied contract (so highly beneficial and useful) of having undertaken to account for money received to another's use.

4. Once more: it hath been said that equity is not bound by rules or precedents; but acts from the opinion

(*k*) De Æquit. s. 3.

(*l*) 1 Roll. Abr. 374; 4 Inst. 84; Earl of Bath *v.* Sherwin, 10 Mod. 1.

(*m*) Vide sup. vol. I. p. 371.

[of the judge, founded on the circumstances of every particular case (*n*), whereas, in truth, our system of equity is a laboured connected system, governed by established rules; and bound down by precedents, from which it does not depart, although the reason of some of them may perhaps be liable to objection. Nay, sometimes a precedent has been so strictly followed in equity, that a particular judgment, founded upon special circumstances, has given rise to a general rule (*o*).

It is true that the notion just mentioned, of the character, power and practice of a court of equity, was formerly adopted and propagated (though not with approbation of the thing), by our principal antiquaries and lawyers,—by Spelman, Coke, Lambard and Selden, and even the great Bacon himself (*p*). But this was in the infancy of our courts of equity, before their jurisdiction was settled, and when the chancellors themselves,—partly from their ignorance of law (being frequently bishops or statesmen), partly from ambition and lust of power (encouraged by the arbitrary principles of the age they lived in), but principally from the narrow and unjust decisions of the courts of law,—had arrogated to themselves such unlimited authority, as hath been totally disclaimed by their successors, since the close of the seventeenth century. The decrees of a court of equity, were then rather in the nature of awards, formed on the sudden, *pro re natâ*, with more probity of intention than knowledge of

(*n*) This is stated by Mr. Selden (Table Talk, tit. Equity), with more pleasantry than truth: "For *law* we have a measure, and know what to trust to; *equity* is according to the conscience of him that is chancellor; and as that is larger or narrower, so is equity. It is all one, as if they should make the standard for the measure a chancellor's foot. What an uncertain measure would this be! One chancellor has a long foot, another a short foot, a third an indifferent foot. It is the same thing with the chancellor's conscience."

(*o*) See the case of Foster and Munt, 1 Vern. 473, with regard to the undisposed *residuum* of personal estates.

(*p*) See Archeion, 71, 72, 73; De Augm. Scient. l. 8, c. 3; Table Talk, tit. Equity; Gloss. 108.

[the subject,—and founded on no settled principles, as being never designed and therefore never used as precedents. But the systems of jurisprudence both at law and in equity, are now equally fixed or positive systems; though varied by different usages in the forms and mode of their proceedings; the one being originally derived, (though much reformed and improved,) from the feudal customs as they prevailed in different ages in the Saxon and Norman judicatures (*q*); the other, (but with equal improvements,) from the imperial and pontifical formularies introduced by their clerical chancellors.]

Subject to this difference in the forms of procedure (*r*), these systems are also in strict accordance with each other, as to the *principles* on which they proceed; the maxim generally applicable to the subject being, that *equity follows the law.* Some instances indeed exist,—where a manifestly harsh and unreasonable rule having been maintained at law, owing to a want of proper liberality and expansion in the views of the judges, relief has been afforded from it by equity. [Thus the penalty of a bond, originally contrived to evade the absurdity of those monkish constitutions which prohibited taking interest for money, was therefore very pardonably considered as the real debt in the courts of law, when the debtor neglected to perform his agreement for the return of the loan, with interest; for the judges could not, as the law then stood, give judgment that the interest should be specifically paid. But when afterwards the taking of interest became legal, as the necessary companion of commerce, —nay, after the statute of 37 Hen. VIII. c. 9, had declared the debt or loan itself to be "the just and true intent" for which the obligation was given, their narrow-minded successors still adhered wilfully and technically to the letter of the antient precedents; and refused to con-

(*q*) Vide sup. vol. I. p. 44.

(*r*) Many of these forms will still necessarily differ, notwithstanding the alterations introduced by the Judicature Act, 1873.

[sider the payment of principal, interest and costs as a full satisfaction of the bond. At the same time more liberal men who sat in the courts of equity, construed the instrument according to its "just and true intent," as merely a security for the loan: in which light it was certainly understood by the parties; at least after these determinations; and therefore this construction should have been universally received. So in mortgages, being only a landed, as the other is a personal, security for the money lent, the payment of principal, interest and costs ought at any time, before judgment executed, to have saved the forfeiture in a court of law, as well as in a court of equity. And the inconvenience, as well as injustice, of putting different constructions in different courts, upon one and the same transaction, obliged the parliament at length to interfere; and to direct, by the statutes 4 Anne, c. 16, and 7 Geo. II. c. 20, that, in cases of bonds and mortgages, what had long been the practice of the courts of equity should also for the future be universally followed in the courts of law, wherein it had before these statutes in some degree obtained a footing (*s*).]

But notwithstanding these particular exceptions, the maxim, that equity follows the law, has been long fully recognized; so that the rules of property, the rules of evidence, and the rules of interpretation, are, or ought to be, the same under both systems. [Thus neither equity, nor law, can vary men's wills or agreements; or, (in other words,) make wills or agreements for them. Both are to understand them truly, and therefore both of them uniformly. One system will not extend, nor the other abridge a lawful provision deliberately settled by the parties, contrary to its just intent. Equity, again, no more than law, can relieve against a penalty in the nature of stated damages,—as a rent of 5*l.* an acre for ploughing

(*s*) See Stern *v.* Vanburgh, 2 Keb. 553, 555; Elliott *v.* Callow, Salk. 597; Anonym. 6 Mod. 11; Burridge *v.* Fortescue, ib. 60; Ireland's case, ib. 101.

[up antient meadow (*t*); nor against a lapse of time, where the time is of the essence of the contract,—as in covenants for renewal of leases. Both systems equitably construe, but neither pretends to control or change, a lawful stipulation or agreement. And upon the same principle, where the subject matter is such as requires to be determined *secundum æquum et bonum*, as generally upon actions on the case, the judgments of our law courts have ever been guided by the most liberal equity. In matters of positive right, both law and equity must submit to and follow those antient and invariable maxims, "*quæ relicta sunt et tradita*" (*u*). Both follow the law of nations, and collect it from history and the most approved authors of all countries, where the question depends upon that law; as in the case of the privileges of ambassadors. In mercantile transactions, they both follow the marine law, and argue from the usages and authorities received in all maritime countries. Where they exercise a concurrent jurisdiction, they both follow the law of the proper *forum;* in matters originally of ecclesiastical cognizance, they both equally adopt the canon or imperial law, according to the nature of the subject; and if a question came before either, which was properly the object of a foreign municipal law, they would both receive information as to what is the rule of the country, and would both decide accordingly (*x*).] It must, however, be admitted that in certain matters over which they hold *divisum imperium* the courts of equity and the courts of law have not been consistent, so that the abuse has arisen that a different rule has obtained according to the remedy of the suitor being at law or in equity. The framers of the Judicature Act, 1873, have seized the occasion of the union of the

(*t*) See Aylett *v.* Dodd, 2 Atk. 239.

(*u*) "*De jure naturæ, cogitare per nos atque dicere debemus; de jure populi Romani, quæ relicta sunt et tradita.*"—Cic. de Leg. 1, 3,.*ad calc.*

(*x*) See Phil. on Ev. vol. ii. p. 144.

several courts, whose jurisdiction has been transferred by that Act to the High Court of Justice thereby established, to amend and declare the law to be administered in England as to the following matters respecting which such discrepancy as above referred to existed. 1. An estate for life without impeachment of waste shall not confer or be deemed to have conferred upon the tenant for life any legal right to commit waste of the description known as equitable waste, unless an intention to confer such right shall expressly appear by the instrument creating such estate. 2. There shall not be any merger by operation of law only, of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity. 3. A mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land, as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass or other wrong relative thereto, in his own name only, unless the cause of action arises upon a lease or other contract made by him jointly with any other person. 4. Any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if the Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concur-

rence of the assignor; provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or any one claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same; or he may, if he think fit, pay the same into the High Court of Justice under the Acts for the relief of Trustees. 5. Stipulations in contracts, as to time or otherwise, which would not before the passing of the Act have been deemed to be, or to have become, of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have theretofore received in equity. 6. An injunction may be granted whether the estates claimed by both or by either of the parties are legal or equitable. 7. In questions relating to the custody and education of infants the rules of equity shall prevail. 8. Generally in all matters not hereinbefore particularly mentioned, in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail (*y*).

Such, then, being the parity of law and reason which governs both systems, wherein (it may be asked) does their essential difference consist? It principally consists

(*y*) 36 & 37 Vict. c. 66, s. 25. This same provision of the Judicature Act, 1873, also declares the law thereafter to be observed in some other matters in which the rules of some other courts consolidated with the High Court varied or conflicted with the rules of equity or *inter sese*. Thus—1. It assimilates the administration of the assets of persons dying insolvent after the passing of the Act to the rules of *bankruptcy*. 2. It provides that no claim of a cestui que trust against his trustee for any property held on an express trust shall be barred by any Statute of Limitations; and 3. It declares that in collision suits, where *both ships are in fault*, the rules in force in the common law courts (which make contributory negligence fatal to the action) shall prevail over the rules of the Court of Admiralty.

in the difference of the subjects over which they exercise jurisdiction; in the kind of relief they administer; and the method of proceeding they observe (*z*).

I. And, first, as to the subjects of jurisdiction. The jurisdiction in equity having been originally introduced, as elsewhere shown, to mitigate certain severities and to supply certain defects, existing in the common law, and from which relief could not otherwise be obtained, such jurisdiction is consequently to be considered as in the nature of a supplement only, (however valuable and extensive,) to the proper and antient scheme of judicature (*a*). A complete knowledge of the nature and extent of subjects of equitable jurisdiction cannot be obtained without consulting the treatises which have been written on Chancery Practice. But a general idea of the business which has hitherto been transacted in the courts of equity may be gained from that provision of the Judicature Act, 1873, which assigns to the chancery division of the High Court of Justice by that Act established "all causes and matters" commenced under any act of parliament by which exclusive jurisdiction in respect thereof has been given to the Court of Chancery, or to any judges or judge thereof respectively, except appeals from county courts in the exercise of their equitable jurisdiction; as well as all causes and matters for any of the following purposes:—1. The administration of the estates of deceased persons; 2. The dissolution of partnerships or the taking of partnership or other accounts; 3. The redemption or foreclosure of mortgages; 4. The raising of portions, or other charges on land; 5. The sale and distribution of the proceeds of property subject to any lien or charge; 6. The execution of trusts, charitable or private; 7. The rectification, or setting aside, or cancellation of deeds or other written instruments; 8. The specific performance

(*z*) See Wykham *v.* Wykham, 18 Ves. jun. 415; Clarke *v.* Parker, 19 Ves. jun. 21, 22.

(*a*) Vide sup. vol. I. p. 80.

of contracts between vendors and purchasers of real estates, including contracts for leases; 9. The partition or sale of real estates; and 10. The wardship of infants and the care of infants' estates (*c*).

II. As to the kinds of relief. We shall here only particularly notice four kinds of relief which are afforded by a court of equity, namely, 1st, where it protects and enforces the execution of trusts; 2ndly, where it enforces the specific performance of contracts; 3rdly, where it grants an injunction; 4thly, where it lends its aid to perpetuate testimony.

1st. The origin and nature of *trusts* have been stated under a former division of this work (*d*). In the present place we have further to remark, that for their protection and enforcement, no means are in general afforded at law; but that proceedings may be taken in equity, praying such relief as the circumstances of the case require; such as that of compelling the trustee to account for trust money received (*e*); or compelling the sale of the trust property, and a due application of the proceeds under the direction of the court; or setting aside dispositions of trust property made in breach of trust, and with knowledge of the trust, on the part of the purchaser as well as the trustee (*f*); or appointing new trustees, either in substitution for or in addition to the existing ones.

In connection with the subject of trusts, may be also singled out for notice proceedings for the *administration of assets* (*g*): involving the payment of debts and legacies;

(*c*) 36 & 37 Vict. c. 66, s. 34.

(*d*) Vide sup. vol. I. p. 371.

(*e*) In Bostock *v.* Floyer, Law Rep., 1 Eq. Ca. 26, it was held as "too clear for argument" that a trustee is liable for the loss of a trust fund caused by the fraudulent act of his solicitor.

(*f*) As to the setting aside of transactions inequitable by reason of the fiduciary relations of the parties, see Tate *v.* Williamson, Law Rep., 1 Eq. Ca. 528.

(*g*) The nature of *assets* was explained, sup. vol. I. p. 432. The word assets, however, is sometimes applied more generally, and then expresses any distributive estate, whe-

and the distribution of residues, out of the estates, (whether legal or equitable,) of deceased persons; and the passing of the accounts of such estates;—under the authority of the court. Such proceedings may be instituted either by a creditor, legatee, or next of kin; or even by the personal representative himself, when disinclined to undertake the responsibility of administering the assets (*h*). They are proceedings wholly belonging to the province of equity, as at law effect only is given to the claim of the particular suitor without ever undertaking a general distribution even of assets of this description (*i*). It forms one of the provisions of the Judicature Act, 1873, that in the administration of the assets of any person who may die after the passing of that Act, and whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules shall prevail and be observed as to the respective rights of secured and unsecured creditors, and as to debts and liabilities provable, and as to the valuation of annuities and future or contingent liabilities respectively, as may be in force for the time being under the law of

ther the owner is a deceased person or not. It may be convenient to remark here, upon the doctrine of equity which is called the *marshalling of assets*. If a distributive estate comprises two funds, and has to satisfy two sets of claimants,—and one set are entitled to resort to either fund, and the other to one of them only,—and the former set so far exhausts the fund to which the latter set have a right to resort, that it becomes insufficient to pay them,—they will in some cases be entitled, in equity, to be paid *pro tanto* out of the other fund; in which case the assets are said to be "marshalled" in their favour. As to the learning on this subject, see Spence, Eq. Jur. vol. ii. 826; Ram on Assets, chap. xxviii.

(*h*) See 15 & 16 Vict. c. 86, ss. 45—47. By 22 & 23 Vict. c. 35, s. 29, the personal representative may, even without reference to Chancery, ascertain the outstanding debts and liabilities by notices of a proper kind in the newspapers; and at the expiration of the time named in such notices proceed to distribute among the parties entitled, and of whose claims he has been apprised. See also sect. 30, and 23 & 24 Vict. c. 38, s. 9.

(*i*) The only case in which an action for a legacy seems maintainable at law, is where a chattel has been specifically bequeathed, and the bequest assented to by the executor. See Doe *v.* Guy, 3 East, 123; 2 Saund. by Wms. 137 (*c*), 6th edit.

bankruptcy, with respect to the estates of persons adjudged bankrupt (*k*).

The legislature has recently been very active in its provisions on the subject of trusts. Among them the following seem to require some notice in this place.

By 10 & 11 Vict. c. 96 (*l*), all trustees, executors, administrators or other persons having in their hands monies belonging to *any trust*, are enabled to pay over the same, with the privity of the paymaster-general, to the Bank of England, (or to transfer any stock or government securities standing in their names into the name of such paymaster-general,) in trust to attend the orders of the court, and the receipt given shall be a sufficient discharge to the trustees or other person for the monies so paid, or stocks or securities transferred (*m*).

By 22 & 23 Vict. c. 35, s. 26 (*l*), no trustee, executor, or administrator making any payment, or doing any act *bonâ fide* under a power of attorney, shall be liable for what is so done, by reason that the person who gave the power was dead at the time of such payment or act, or had done some act to avoid the power.

By the same Act, sect. 30, and 23 & 24 Vict. c. 38, s. 9, any trustee, executor, or administrator, may apply to an equity judge at chambers, for his opinion or direction respecting the management or administration of the trust property or the assets; and by acting on such opinion or

(*k*) 36 & 37 Vict. c. 66, s. 25, subs. (1).

(*l*) In addition to those noticed in the text see also the following statutes passed for relief of trustees; the enlargement of their powers; and the removal of inconvenience, arising from their disability to act in certain cases:—43 Geo. 3, c. 75; 59 Geo. 3, c. 80, s. 2; 6 Geo. 4, c. 74; 9 Geo. 4, c. 78; 11 Geo. 4 & 1 Will. 4, c. 65; 3 & 4 Will. 4, c. 74, ss. 33, 91; 8 & 9 Vict. c. 97, s. 3; c. 118, ss. 20, 137; 12 & 13 Vict. c. 74; 13 & 14 Vict. c. 35, ss. 19—25; c. 60; 15 & 16 Vict. c. 55; 16 & 17 Vict. c. 70, s. 108, et seq.; 18 & 19 Vict. c. 13; c. 91, s. 10; 19 & 20 Vict. c. 120, ss. 17, 36.

(*m*) In the 10 & 11 Vict. c. 96, the "Accountant-General of the Court of Chancery" is named; but that office is abolished by 35 & 36 Vict. c. 44, and its duties transferred to the Paymaster-General.

direction, shall be deemed, so far as regards his own responsibility, to have discharged his duty.

By the same Act of 22 & 23 Vict. c. 35, s. 31, every instrument creating a trust, either expressly or by implication, shall be deemed to contain a clause to the effect following, viz. that the trustees or trustee shall be chargeable only for what they shall respectively actually receive, notwithstanding their signature of any receipt for the sake of conformity, and shall be answerable only for their own acts and neglects, and not for those of each other, nor for any person with whom any trust fund may be deposited, nor for any deficiency of any securities, unless through their own wilful default; and also that it shall be lawful for them to reimburse themselves, out of the trust premises, all expenses incurred in the execution of the trusts.

By 23 & 24 Vict. c. 145, ss. 1—7 (*n*), it is provided that in all cases where, by any instrument of settlement, it is expressly declared that trustees or other persons therein indicated shall have a power of sale over any hereditaments, it shall be lawful for such trustees or other persons, whether such hereditaments be vested in them or not, to exercise such power of sale, by selling the same, either together or in lots, and either by auction or by private contract.

By the same Act it is provided, that trustees, with trust money in their hands, which it is their duty to invest at interest, may, in their discretion, invest the same in any of the parliamentary stocks or public funds, or in government securities (*o*); provided that no investment

(*n*) The provisions in this Act (except as therein otherwise provided) extend only to persons entitled or acting under an instrument executed after the passing of the Act, viz. 28th August, 1860.

(*o*) Sect. 25. By 22 & 23 Vict. c. 35, s. 32, trust monies are, also, authorised to be invested in real securities in any part of the United Kingdom, or in Bank or *East India* stock (see 30 & 31 Vict. c. 132),—provided the investment be reasonable and proper,—and provided, also, no express direction of the instrument creating the trust, be thereby infringed.

shall be made except in the £3 per cent. consols, where there is a person under no disability entitled in possession to receive the income during life (or for a term determinable with life), or for any greater estate,—without consent in writing of such person (*p*). And this Act also contains provisions (sect. 26) authorizing trustees to provide, out of the trust funds, for the maintenance and education of infant *cestuis que trusts*;—and (sect. 27) for the appointment of new trustees in the event of any trustees dying or becoming unfit to act, or being desirous to be discharged from acting (*q*);—and also (sect. 29) making the receipts in writing of any trustees, for money payable to them as trustees, sufficient discharges, and effectually exonerating the party paying, without his being required to see to the application thereof (*r*).

By 24 & 25 Vict. c. 96, provisions are made against the fraudulent conversion of trust funds by the trustees; but such conduct amounts to a heinous crime, and consequently belongs to our next and concluding volume, to which the reader is referred (*s*).

And lastly, by 25 & 26 Vict. c. 108, s. 2, it is provided that every trustee and other person authorized to dispose

(*p*) By 23 & 24 Vict. c. 38, ss. 10, 11, the Lord Chancellor was empowered (with the assistance of the other equity judges) to make orders from time to time as to the investment of cash under the control of the Court of Chancery; and it was enacted, that it should be lawful for trustees, executors and administrators having power to invest their trust funds on government securities or upon parliamentary stocks, funds, or securities, to invest their trust funds in the same way. And, accordingly, an order issued, under which cash in the control of the court may be invested in, 1. The consols, £3 per cent. annuities. 2. Reduced £3 per cent. annuities. 3. New £3 per cent. annuities. 4. Bank stock. 5. East India stock. 6. Exchequer bills. 7. £2:10s. per cent. annuities. 8. On mortgage of freehold or copyhold estate in England or Wales. As to the practice under the above enactments, see In re Wilkinson's estate, Law Rep., 9 Eq. Ca. 343.

(*q*) As to the principles on which the court will be guided in selecting new trustees, see In re Tempest, Law Rep., 1 Ch. Ap. 485.

(*r*) See also the previous enactment of 22 & 23 Vict. c. 35, s. 23.

(*s*) Vide post, vol. IV. p. 133.

of land by way of sale, exchange, partition or enfranchisement, may, unless forbidden by the instrument creating the trust or power, so dispose thereof, with an exception or reservation of any minerals, or may dispose of the minerals separately from the residue of the land; but such disposition must be sanctioned by the Court of Chancery, to be obtained on petition in a summary way.

2ndly. The Court of Chancery has long exercised the jurisdiction of *decreeing the specific performance of agreements*, instead of giving redress for their non-performance by way of damages (*t*). And hence a fiction is established in equity, that what ought to be done shall be considered as being actually done, and shall relate back to the time when it ought to have been done originally. This mode of relief, indeed, is confined, generally speaking, to contracts of lands, it not being the ordinary practice in equity to enforce the specific performance of agreements relating to personalty; for the breach of those may in general be adequately redressed at law (*u*). But contracts for the purchase of land or the like (including contracts for leases) will be decreed to be specifically performed (*x*); and here the application of the doctrine above referred to, which considers as actually done that which ought to have been done, gives birth to nearly all the same consequences in equity, as would follow at law from a conveyance actually made to the vendee at the time specified in the contract. Thus, though the legal estate remains in the vendor till the conveyance is completely executed, the vendor is in equity considered as having been *trustee*

(*t*) This practice has been traced to the time of Edward the fourth. (1 Mad. Chan. p. 361.) The Court of Chancery, by 21 & 22 Vict. c. 27 (sometimes called Lord Cairn's Act), was enabled to give *damages* to the party injured; a relief which, prior to that provision, that Court had no power to award. (See Anglo-Danubian Company *v.* Rogerson, Law Rep., 4 Eq. Ca. 3.)

(*u*) As to specific performance of contracts, see Mortlock *v.* Buller, 10 Ves. jun. 315; 1 Mad. Chan. 402; Claringbould *v.* Curtis, 21 L. J., Ch. 541.

(*x*) See 36 & 37 Vict. c. 66, s. 34, subs. (3).

for the vendee from the time specified in the contract; and the vendee, on the other hand, as a trustee for the vendor from the same period, so far as the purchase-money is concerned.

3rdly. With respect to an *injunction*;—this may be obtained, in a variety of cases, to restrain the defendant from committing any acts in violation of the plaintiff's rights: as, particularly, to restrain him from infringing a patent or copyright; or from committing waste or nuisance (*y*); and in instances of an urgent nature, (if the case be supported by a proper affidavit,) it may be obtained immediately upon the institution of the proceedings and without any previous notice to the opposite party (*z*). An injunction also is sometimes sought to restrain a person from prosecuting his action at law or from enforcing a judgment he has obtained; but, with regard to the Supreme Court of Judicature, there is a provision that no cause or proceeding pending in the High Court of Justice or before the Court of Appeal shall be restrained either by prohibition or injunction; but every matter of equity on which an injunction against the prosecution of any such cause or proceeding might have been obtained if the Act had not passed, either unconditionally

(*y*) By 5 Vict. c. 5, ss. 4, 5, the Court of Chancery may restrain the Bank of England or other public company from permitting a transfer of stock or shares, or from paying any dividend.

(*z*) It forms one of the provisions of the Judicature Act, 1873, that an injunction may be granted by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the court shall think just; and if an injunction is asked, either before, or at, or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted, if the court shall think fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be restrained under any colour of title; and whether the estates claimed by both or by either of the parties are legal or equitable. (36 & 37 Vict. c. 66, s. 25.)

or on any terms and conditions, may be relied on by way of defence thereto. But either of such courts may nevertheless direct a stay of proceedings in any cause or matter pending before it, if it shall think fit (*a*).

4thly. As to the *perpetuation of testimony* (*b*). The examination of witnesses never takes place at common law, except in reference to matters in respect of which some proceeding has been already commenced. But it is sometimes very material for the protection of existing rights, that the evidence relating to them should be taken and preserved, though they may not yet be the subject of any proceedings in the courts,—the position of the parties interested being such as not yet to afford any occasion or opportunity for litigation; for there may be reasons, nevertheless, to expect a future contest of the right, and that at a period when the witnesses, now competent to give material evidence upon it, may have been removed by death. In such cases, therefore, a court of equity lends its aid, by permitting any of the parties interested to institute proceedings against the rest, with a view to the mere perpetuation of the testimony, and without reference to any other present relief. And this is effected by taking down, as in an ordinary cause, the examinations or depositions of the witnesses,—which in the event of the right being tried at any future period, when the attendance of the witnesses can no longer be procured, may be received in evidence between the same parties or those claiming under them (*c*). And with a view to extend the application of so convenient and important a remedy, it was enacted by the 5 & 6 Vict. c. 69, that any person who would, under the circumstances alleged by him to exist,

(*a*) 36 & 37 Vict. c. 66, s. 24, subs. (5).

(*b*) See Earl Spencer *v.* Peck, Law Rep., 3 Eq. Ca. 415. As to a bill *quia timet*, see Woollridge *v.* Norris, Law Rep., 6 Eq. Ca. 413.

(*c*) This is most frequent when lands are devised by will, away from the heir at law: and the devisee institutes a suit to perpetuate the testimony of the witnesses to the will. This is what is usually meant by *proving a will in Chancery*. (3 Bl. Com. 450.)

become entitled, upon the happening of any future event, to any honour, title, dignity or office; or to any estate or interest in any property real or personal; the right or claim to which cannot by him be brought to trial before the happening of such event,—shall be entitled to take proceedings in Chancery, to perpetuate any testimony which may be material for establishing such claim or right (*d*).

[These are some of the matters wherein jurisdiction is at present exercised in our courts of equity: which jurisdiction differs, we see, very considerably from the notions entertained by strangers, and even by those courts themselves before they arrived at maturity; as appears from the principles laid down, and the jealousies entertained of their abuse, by our early juridical writers cited in a former page (*e*); and which were received and handed down by subsequent compilers, without attending to those gradual accessions and derelictions by which, in the course of a century, this mighty river had imperceptibly shifted its channel. Lambard, in particular, in the reign of Queen Elizabeth, lays it down (*f*), that "equity should "not be appealed unto but only in rare and extraordinary "matters; and that a good chancellor will not arrogate "authority in every complaint that shall be brought "before him, upon whatsoever suggestion: and thereby "both overthrow the authority of the courts of common "law, and bring upon men such a confusion and un-"certainty as hardly any man should know how or how "long to hold his own assured to him." And certainly, if a court of equity were still at sea, and floated upon the occasional opinion which the judge who happened to preside might entertain of conscience in every par-

(*d*) A jurisdiction of a somewhat similar, though more limited, kind has been conferred on the New Divorce Court in reference to the questions of legitimacy and nationality. (See 21 & 22 Vict. c. 93; 22 & 23 Vict. c. 61, s. 7.)

(*e*) Vide sup. p. 449.

(*f*) Archeion, 80, 81.

[ticular case, the inconvenience that would arise from this uncertainty, would be a worse evil than any hardship that could follow from rules too strict and inflexible. Its powers would have become too arbitrary to have been endured in a country like this; which boasts of being governed in all respects by law, and not by will. But since the time when Lambard wrote, a set of great and eminent lawyers who have successively held the Great Seal, have by degrees erected the system of relief administered by a court of equity into a regular science; which cannot be attained without study and experience, any more than the science of law: but from which, when understood, it may be known what remedy a suitor is entitled to expect, and by what proceeding, as readily and with as much precision, in a court of equity, as in a court of law.

It would carry us beyond the bounds of our present purpose to go further into this matter. It seemed desirable to go so far; because strangers are apt to be confounded by nominal distinctions, and the loose unguarded expressions to be met with in the best of our writers. It hath also afforded us an opportunity to vindicate, on the one hand, "law" from being that harsh and illiberal rule, which many are too ready to suppose it; and, on the other, "equity" from being the result of mere arbitrary opinion, or an exercise of dictatorial power, which rides over the law of the land, and corrects, amends and controls it by the loose and fluctuating dictates of the conscience of a single judge.]

CHAPTER IX.

OF THE LIMITATION OF ACTIONS.

WE have now considered the various injuries between one subject of the realm and another, of which the law takes notice; and the general nature of the remedies provided by the courts. When any of these injuries have been committed, it follows that a right of redress has arisen; but after ascertaining this, there still remains another point for consideration before it can be determined that such right still subsists, viz. how long it has existed; for there is established, by certain statutes called the *Statutes of Limitation*, a certain period, after which the remedy by action is barred by the mere effect of lapse of time.

The use of these Statutes of Limitation is to preserve the peace of the kingdom; and to prevent those innumerable perjuries which might ensue, if a man were allowed to bring an action for an injury committed at any distance of time. Upon these accounts our law therefore holds, that *interest reipublicæ, ut sit finis litium;* just as by the laws of Athens, actions were prohibited in cases where the injury was committed a certain period before the complaint was made (*a*). Nor are these the only reasons on which the bar by lapse of time is founded; for if the plaintiff

(*a*) 3 Bl. Com. 308. So also under the imperial civil law various periods of limitation were assigned, and by a constitution of Honorius and Theodosius, actions could not be brought more than thirty or in some cases forty years after the right accrued. By the earlier Roman law there was no limitation of such actions as arose out of the *jus civile*, though it was otherwise as to most of the Prætorian actions.

were permitted to bring a claim forward at any period, however remote, there would be danger of its being delayed until the defendant had, by some casualty, been deprived of the documentary or other evidence by which it might once have been successfully encountered; and the delay might even be practised with the fraudulent design of exposing him to this disadvantage. Besides which, it is to be considered, that great hardship always attaches to the case of a party, who, after a long possession,—not originating in any fraud or other misconduct of his own,—finds himself unexpectedly liable to eviction; while, on the other hand, a supine claimant is entitled to no favour or protection from the law: the maxim being, that *vigilantibus, non dormientibus, jura subveniunt.*

The course of legislation upon the subject under consideration, has been such as to lead naturally to its division into such statutory limitations as have reference to land and the rights issuing thereout, and such as have reference strictly to things personal. The first of these two branches shall be now discussed:—

I. Of limitations as to entry or distress on land, and proceedings for the recovery of the realty, or of rights issuing thereout.

It was in reference to real actions, while still the only forms of action for recovery of the realty, that the law of limitations was first established. And, originally, such actions were limited from some particular event, or fixed era. Thus, by the antient law in the time of Henry the second, the demandant, in a writ of right, could not claim upon any seisin earlier than the reign of Henry the first, nor, by the Statute of Merton, (20 Hen. III. c. 8,) earlier than the reign of Henry the second; nor by Statute of Westminster the first, (3 Edw. I. c. 39,) earlier than that of Richard the first (*b*). And the same species

(*b*) See 3 Bl. Com. p. 196, and Com. Dig. Temps (G).

of limitation, though from more recent dates, was, by the same statutes, from time to time appointed for many other kinds of real action. But these dates were allowed afterwards to continue so long unaltered, that in process of time they became, in effect, no limitation at all; which gave rise at length to the Statute of Limitation, 32 Hen. VIII. c. 2. This Act took a different course, and limited real actions not from any fixed date or event, but according to a fixed interval of antecedent time; and provided, that where, in any writ of right or any action possessory, the demandant claimed upon his own seisin, it must be a seisin within thirty years back; where on the seisin of his ancestor, it must (in a writ of right) be a seisin within sixty, or (in a possessory action) within fifty years (*c*). And afterwards, by 21 Jac. I. c. 16, s. 1, it was enacted, that all writs of formedon (*d*) should be brought within twenty years after the cause of action first fallen; and also that no person should make *entry* into any lands or hereditaments, but within twenty years after his right should first accrue; from which last enactment it followed, that the same period of twenty years also became the limitation, (as it still is,) in every action of ejectment, for no ejectment can be brought unless where the plaintiff is entitled to enter on the lands (*e*).

And thus stood the doctrine of limitation in general, so far as relates to the recovery of real property, during the whole of the long period that elapsed from the reign of Henry the eighth to that of William the fourth; upon which branch of the law, however, as it stood during

(*c*) 3 Bl. Com. 189. This statute extended to *rents, suits, and services*, as well as other hereditaments; but only to those which were customary or prescriptive, and not to those created by deed, or reserved on a particular estate. (Ibid.) Nor did it extend to services of a casual kind, such as by possibility might not become due within the period of limitation,—such as fealty. (Com. Dig. Temps (G), 9.)

(*d*) As to formedon *in descender*, see Rimington *v.* Cannon, 22 L. J. (C. P.) 153.

(*e*) Christ. Bl. Com. vol. iii. p. 204, n. (2), p. 206.

that period, it may be proper, for the further information of the reader, to make some additional remarks. First, then, it may be observed, that there originally existed no provision that was applicable to *claims by the Crown;* for the maxim formerly was, that *nullum tempus occurrit regi*, and the statute of Henry the eighth was not so framed as to bind the Crown's rights. By the statute indeed of 21 Jac. I. c. 2, a time of limitation was extended to the case of the sovereign, viz. sixty years precedent to 19th February, 1623 (*f*); but this of course became ultimately ineffectual by reason of the gradual efflux of time. It was however at length provided, by 9 Geo. III. c. 16, that in suits relating to land, the Crown should be bound by the lapse of sixty years; by which statute,—as amended in certain points by 24 & 25 Vict. c. 62,—the law relating to this subject is still governed (*g*). Secondly, we may remark, that even up to the reign of William the fourth there existed no limitation with regard to the time within which any actions touching *advowsons* were to be brought, at least none later than the times of Richard the first and Henry the third; for by the statute 1 Mar. st. 2, c. 5, the 32 Hen. VIII. c. 2, was declared not to extend to any writ of right of advowson, *quare impedit*, or assize of darreign presentment, or *jus patronatûs* (*h*). And the reason for this seems to have been because it may very easily happen, that the title to an advowson may not come in question, nor the right have an opportunity to be tried, within the period of sixty years,—which was the longest time of limitation assigned by the statute of Hen. VIII. Indeed, instances are not wanting wherein two successive incumbents have continued for upwards of a hundred

(*f*) 3 Inst. 189.

(*g*) See also 21 Jac. 1, c. 14, making some regulations as to *informations of intrusion*, where the Crown has been out of possession twenty years; and see 7 & 8 Vict. c. 105; 23 & 24 Vict. c. 53; 24 & 25 Vict. c. 62, s. 2, as to suits arising *within the duchy of Cornwall.*

(*h*) 3 Bl. Com. 250. And see 7 Ann. c. 18, which allowed a *quare impedit* to be brought upon any prior presentation, however distant.

years. Had therefore the last of these incumbents been the clerk of an usurper, or been presented by lapse, it would have been necessary and unavoidable for the patron, in case of a dispute, to have recurred back above a century, in order to have shown a clear title and seisin by presentation and admission of the prior incumbent (*i*).

The state of the law of limitation above described having attracted attention, various improvements were suggested on this subject, founded on the general principle, that twenty years is an allowance of time reasonably sufficient in every case for the recovery of corporeal hereditaments,—provided the claimant labours under no disability to assert his pretensions. These recommendations were afterwards embodied into the statute 3 & 4 Will. IV. c. 27 (*k*); and this Act—which now governs the law of limitation in all proceedings, (other than those to which the Crown is a party,) for recovery of things real, comprises a body of enactments too numerous and diversified to be capable of complete enumeration in a work like the present (*l*). A selection shall, however, be made of such as seem to require the chief attention of the student.

1. That no person (*m*) shall, after the 31st December, 1833, make entry or distress upon, or bring an action to recover, any land (*n*) or rent (*o*),—unless within *twenty*

(*i*) See 3 Bl. Com. 251.

(*k*) Among the cases which have been decided on the construction of this Act, are the following:—Grant *v.* Ellis, 9 Mee. & W. 113; Owen *v.* De Beauvoir, 16 Mee. & W. 547; S. C. (in error), 5 Exch. 166; Forsyth *v.* Bristowe, 9 Exch. 716; Manning *v.* Phelps, 10 Exch. 59; Humfrey *v.* Gery, 7 C. B. 567; Borrows *v.* Ellison, Law Rep., 6 Exch. 128.

(*l*) As to one of the enactments not mentioned in the text, viz., that contained in sect. 40 of 3 & 4 Will. 4, c. 27, see the subsequent enactment of 23 & 24 Vict. c. 38, s. 11.

(*m*) The term "person," as defined by 3 & 4 Will. 4, c. 27, s. 1, for the purposes of that Act, is made to extend to any body politic, corporate or collegiate, and to any *class* of creditors or other persons, as well as an individual.

(*n*) The term "land" is defined, in the same section, to extend to all corporeal hereditaments, and also to tithes, (other than tithes belonging to a spiritual or eleemosynary corporation sole,) whether freehold or copyhold. As to the limitation of actions to recover *tithes*, vide Ely *v.* Cash, 15 Mee. & W. 618.

(*o*) "Rent" is defined, by the same section, to extend to all heriots,

years next after the time at which the right of entry, distress, or action, shall first have accrued (*p*), either to the person himself, or those through whom he claims (*q*). This rule is subject, however, to qualification in the case of persons under disability; it being provided that, if at the time at which the right of any person shall first accrue, such person shall be under the disability of infancy, coverture, idiotcy, lunacy, unsoundness of mind, or absence beyond seas,—then he, or the person claiming through him, may, though twenty years have expired, enter, distrain, or sue within *ten* years next after the person to whom the right accrued shall have died or ceased to be under disability, whichever event shall first happen (*r*); but no such right of entry, distress, or action, shall be exercised, except within *forty* years next after the right accrues,—even though the disability may have attached during the whole of the forty years, or although the term of ten years above mentioned shall not have yet expired (*s*).

2. That, from the same date, no person claiming any land or rent in *equity*, shall bring proceedings to recover

services and suits, for which distress may be made; and to all annuities and periodical sums of money charged on land, except moduses or compositions belonging to a spiritual or eleemosynary corporation sole.

(*p*) The statute (by sect. 8) defines with great care the time at which the right shall be considered as *first accruing*, in different cases that may arise (see Sturgis *v.* Darell, 4 H. & N. 622); and contains special provisions applicable to the case of estates *tail* (as to which, see Austen *v.* Llewellyn, 9 Exch. 276). As to the effect of this statute, upon the former doctrine relative to adverse possession, as applied to the subject of limitation, see Doe *d.* Lansdell *v.* Gower, 17 Q. B. 589.

(*q*) Sect. 2. This expression is defined by sect. 1, to mean any person by, through or under or by the act of whom the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail, tenant by the curtesy, tenant in dower, successor, special or general occupant, executor, administrator, legatee, husband, assignee, appointee, devisee, or otherwise; and also any person who was entitled to an estate or interest to which he, or some person through whom he claims, became entitled as lord by escheat.

(*r*) Sect. 16. See Borrows *v.* Ellison, Law Rep., 6 Exch. 128.

(*s*) Sect. 17.

the same, but within the same period during which, by virtue of the provisions of the Act, he might have entered, distrained, or brought an action for recovery thereof, if his estate had been legal, instead of equitable (*t*). This is subject, however, to the following provisions:—*First*, That when land or rent is vested in a trustee upon some express trust, the right of the *cestui que trust* or any one claiming through him, to sue the trustee or any one claiming through him, in order to recover the same,—shall be deemed to have first accrued when such land or rent was conveyed to a purchaser for a valuable consideration; and shall then be deemed to have accrued only as against such purchaser, and any person claiming through him (*u*). *Secondly*, That in every case of a concealed fraud, the right to sue in equity for the recovery of land or rent shall be deemed to have first accrued when such fraud was, or with reasonable diligence might have been, first known or discovered by the person injured: but not so as to enable any owner of lands or rents to sue in equity for their recovery or for setting aside any conveyance of them on account of fraud, against any *bonâ fide* purchaser for valuable consideration,—provided he did not assist in the commission of such fraud, nor at the time of purchase knew or had reason to believe, that any such fraud had been committed (*v*). *Thirdly*, That nothing in the Act contained shall interfere with any rule of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may *not* be barred by virtue of the statute (*x*). *Fourthly*, That when a mort-

(*t*) 3 & 4 Will. 4, c. 27, s. 24.

(*u*) Sect. 25. In reference to this section, notice however must be taken of the following provision of the Judicature Act, 1873, viz.: that no claim of a *cestui que trust* against *his trustee* for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations. (36 & 37 Vict. c. 66, s. 25.)

(*v*) 3 & 4 Will. 4, c. 27, s. 26. See the effect of this enactment discussed by Malins, V.-C., in the case of Chetham *v.* Hoare, Law Rep., 9 Eq. Ca. 571.

(*x*) Sect. 27.

gagee shall have received the profits of any land, or any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring a suit to redeem the mortgage, except within twenty years next after the time at which the mortgagee obtained the same, —unless in the meantime he shall have given an acknowledgment of title or of the right of redemption, to the mortgagor, or some person claiming his estate, or to the agent of such mortgagor or person. And such acknowledgment, moreover, must be in writing signed by the mortgagee, or the person claiming through him; nor can such redemption suit be brought except within twenty years next after such acknowledgment, or the last of such acknowledgments, if more than one was given (*y*).

3. That, from the same date, no *arrears* of rent or of interest (in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy) or any damages in respect of any such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within *six* years after the same shall have become due or been acknowledged in writing to the person entitled thereto or his agent, signed by the party chargeable or his agent. There is, however, a proviso to meet the case of a prior mortgagee or encumbrancer having been in receipt of the land or profits (*z*).

(*y*) 3 & 4 Will. 4, c. 27, s. 28. This section also contains provisions as to the case of there being more mortgagors or mortgagees than one, and the effect of acknowledgment to or by one of them. (See as to this, Richardson *v.* Younge, Law Rep., 10 Eq. Ca. 275.) We may notice here, that by a subsequent Act, 7 Will. 4 & 1 Vict. c. 28, (reciting that doubts had occurred as to the meaning of the Act in question as to the limitation in case of *mortgages*,) it is declared that it shall be lawful for any person claiming under a mortgage of land to make an entry or bring proceedings to recover it, at any time within twenty years from the last payment on account of principal or interest, though more than twenty years from the time the right first accrued. As to this provision, see Doe *d.* Palmer *v.* Eyre, 17 Q. B. 366; Doe *d.* Baddeley *v.* Massey, 20 L. J. (Q. B.) 434.

(*z*) 3 & 4 Will. 4, c. 27, s. 42. As to the construction of this sec-

4. That, from the same date, no entry, distress, action or suit to recover land or rent, shall be made or brought by any spiritual or eleemosynary corporation sole, after the determination of such period as hereinafter mentioned next after the time at which the right of such corporation sole, or his predecessor, to make or bring the same shall first have accrued;—viz. the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, together with six years after a third person shall have been appointed thereto, if the times of such two incumbencies and six years (taken together) shall amount to the full period of *sixty* years; and if not, then during such further number of years as will make up the sixty years (*a*).

5. That, from the same date, no person shall bring any *quare impedit*, or other proceeding, to enforce a right to present to or bestow any ecclesiastical benefice as the patron thereof, after the expiration of such period as thereinafter mentioned,—viz., the period during which three clerks in succession shall have held the same, all having obtained possession thereof adversely to the right of such person, or of some one through whom he claims, provided such incumbencies taken together shall amount to the full period of sixty years; and, if not, then after the expiration of such further time as will make up the sixty years (*b*).

6. That, from the same date, no person shall bring any such proceeding as mentioned in the last paragraph, after the expiration of *one hundred* years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of such person, or of one through whom he claims, or who is entitled to some preceding estate or interest, or undivided share, or alternate right of

tion, see Edmonds v. Waugh, Law Rep., 1 Eq. Ca. 418; Ex parte Clarke, Law Rep., 3 Eq. Ca. 313. As to the limitation in respect of a *legacy*, see Coope v. Cresswell, *per cur.*, Ib. 2 Ch. Ap. p. 112.

(*a*) 3 & 4 Will. 4, c. 27, s. 29.

(*b*) Sect. 30.

presentation or gift, held or derived under the same title, —unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share or right, held or derived under the same title (*c*).

II. Of limitations as to certain actions not brought for recovery of things real.

1. A period of limitation with respect to most of these is fixed by 21 Jac. I. c. 16, s. 3 (*d*): which provides in substance, that actions of trespass in general; all actions of detinue (*e*), trover, replevin or account (*f*): all actions upon the case, except for verbal slander; and all actions of debt on simple contract, or for arrears of rent not due upon specialty (*g*):—shall be limited to *six* years after the cause of action accrued:—that actions of trespass for the particular injuries of assault, menace, battery, wounding and imprisonment, shall be limited to *four* years; and that actions on the case for verbal slander, shall be limited to *two* years. But to these limitations there are exceptions in favour of persons labouring under *disabi-*

(*c*) 3 & 4 Will. 4, c. 27, s. 33. The periods thus limited as above for enforcing a right to present to or bestow an ecclesiastical benefice, extend to the case where a bishop claims as *patron;* but the Act does not affect the right of any bishop to collate by reason of *lapse*. (See 6 & 7 Vict. c. 54, s. 3.)

(*d*) As to time from which this limitation begins to run in particular cases, see Collinge *v.* Heywood, 9 Ad. & Ell. 633; Rhodes *v.* Smethurst, 6 M. & W. 351; Waters *v.* Earl of Thanet, 2 Q. B. 757; Howell *v.* Young, 5 B. & C. 259; Tobacco Pipe Maker's Company *v.* Loder, 20 L. J. (Q. B.) 414; Webster *v.* Kirk, 17 Q. B. 949; Bonomi *v.* Backhouse, 9 H. of L. Cases, 503.

(*e*) See Wilkinson *v.* Verity, Law Rep., 6 C. P. 206.

(*f*) In 21 Jac. 1, c. 16, s. 3, "actions of account between merchants" are excepted from this limitation—but they are brought within it by 19 & 20 Vict. c. 97, s. 9. As to the former law, see Cottam *v.* Partridge, 4 Man. & G. 271.

(*g*) See also as to arrears of rent, 3 & 4 Will. 4, c. 27, s. 42, sup. p. 473; 3 & 4 Will. 4, c. 42, s. 3, post, p. 478.

lity (*h*). For, if the person *entitled to sue* shall, when the cause of action accrued, be an infant, a feme covert, or *non compos*,—it is provided that he (or she) may sue within the same period after the removal of the disability, as is allowed to persons having no such impediment (*i*). And by 4 Ann. c. 16, s. 19, if any person *liable to be sued* shall, when the cause accrued, be beyond the seas (*k*), —a similar extension of the time for bringing the action shall in that case also be permitted; a provision, however, which must be taken in connexion with the subsequent enactment of 19 & 20 Vict. c. 97, s. 11, viz., that where the cause of action lies against two or more joint debtors, the person entitled to sue shall not be entitled to any extension of time, against such one or more of them as were not beyond seas when the cause of action accrued; and on the other hand, that he shall not be barred from suing the joint debtor or debtors, after his or their return, by reason only that judgment has been already recovered against one or more of the others (*l*).

The operation of the statute of James with respect to actions upon *simple contract*, was at one time considerably narrowed by the doctrine which prevailed, that not only a payment on account of principal or interest, but any mere verbal acknowledgment, made before

(*h*) 21 Jac. 1, c. 16, s. 7.

(*i*) See Le Veux *v.* Berkeley, 5 Q. B. 836; Townsend *v.* Deacon, 3 Exch. 706. The statute of 21 Jac. 1, c. 16, s. 7, also made exception in other cases, viz. that of *imprisonment* of the party entitled to sue, and that of his being *beyond the seas*. But these are no longer disabilities; for by 19 & 20 Vict. c. 97, s. 10, no person or persons shall be entitled to sue at any time beyond the period fixed by 21 Jac. 1, c. 16, s. 3, by reason only of such person, or one or more of such persons, being beyond the seas or imprisoned at the time when the cause of action or suit accrued. (See Cornil *v.* Hudson, 8 Ell. & Bl. 429; Pardo *v.* Bingham, Law Rep., 4 Ch. App. 735.)

(*k*) By 19 & 20 Vict. c. 97, s. 12, no part of the United Kingdom, Man, Guernsey, Jersey, Alderney, and Sark, nor the adjacent islands, being part of the dominions of her Majesty, shall be deemed "beyond seas" within the meaning of 4 Ann. c. 16.

(*l*) As to the law on this point, before the enactment mentioned in the text, see Towns *v.* Mead, 16 C. B. 123.

action brought, that the debt was due,—would suffice to take the case *out of the statute* (according to the common phrase), by raising an implied promise to pay the debt; upon which promise, (as upon a new cause of action,) the same time for instituting a suit would be allowed, as upon the original contract (*m*). But the law on this subject has been since materially altered; for by Lord Tenterden's Act (9 Geo. IV. c. 14, s. 1), it was enacted, that in actions grounded upon any simple contract, no acknowledgment, or promise, shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the 21 Jac. I. c. 16, unless it be contained in some *writing* (*n*), signed by the party to be charged (*o*); and that where there are two or more joint contractors, no such joint contractor shall be chargeable, in respect only of the written acknowledgment of the other. Moreover, by 19 & 20 Vict. c. 97, s. 14 (*p*), it has been since provided, (in reference to the statute of James, and to the effect of a *payment* on account of principal or interest in respect of a joint contract or debt,) that no co-contractors, or co-debtors, shall lose the benefit of the limitation, by reason only of payment of any principal or interest by any of the others (*q*).

(*m*) See Bateman *v.* Pindar, 3 Q. B. 574; Maber *v.* Maber, Law Rep., 2 Exch. 153.

(*n*) As to what is a sufficient acknowledgment or promise for this purpose, see the following among other cases:—Spong *v.* Wright, 9 Mee. & W. 629; Cripps *v.* Davis, 12 Mee. & W. 159; Hart *v.* Prendergast, 14 Mee. & W. 741; Williams *v.* Griffith, 3 Exch. 335; Gardner *v.* M'Mahon, 3 Q. B. 561; Willins *v.* Smith, 4 Ell. & Bl. 180; Evans, app., Simons, resp., 9 Exch. 282; Goate *v.* Goate, 1 H. & N. 29; Holmes *v.* Mackrell, 3 C. B. (N. S.) 789; Rackham *v.* Marriott, 2 H. & N. 196; Cornforth *v.* Smethard, 5 H. & N. 13; Tanner *v.* Smart, 6 B. & C. 603; Buckmaster *v.* Russell, 10 C. B. (N. S.) 745; Everall *v.* Robertson, 1 E. & E. 16; Francis *v.* Hawkester, 1 E. & E. 1052; Lee *v.* Wilmot, Law Rep., 1 Exch. 364.

(*o*) By 19 & 20 Vict. c. 97, s. 13, a writing signed by *an agent duly authorized* to sign will suffice.

(*p*) See Jackson *v.* Woolley, 8 Ell. & Bl. 778; Cockrill *v.* Sparkes, 1 Hurl. & C. 699.

(*q*) As to *payments* in particular cases, and their effect to take the case out of the statute, see Cleave *v.* Jones, 20 L. J. (Exch.) 238; Burn

2. The statute of 21 Jac. I. c. 16, was also in itself materially defective: for it made no provision for actions on bonds, indentures, or other instruments *under seal;* and consequently parties having claims on such instruments were at liberty to sue upon them in covenant or debt, at any period of time, however distant. And though to prevent the injustice which such a state of the law would otherwise have occasioned, it became the practice on the trial of such actions, for the judge to recommend the jury, in cases where no payment on account of principal or interest had been made or demanded within twenty years, to presume that the bond or other specialty had been satisfied,—this method of proceeding was found not to be attended with the same advantage, or to adapt itself so correctly to the purposes of justice, as a law of direct limitation. Such limitation has been consequently now provided with respect to claims on instruments under seal,—as well as some other cases, not embraced by the statute of James (*r*). For it is enacted by the 3 & 4 Will. IV. c. 42, s. 3, that all actions of debt for rent upon any indenture of demise, or of covenant or debt on any bond or other specialty, and all proceedings on recognizances,—shall be brought within *twenty years* after the cause of action or proceeding accrued; and that all actions of debt upon an award, (where the submission is not under seal,) or for a copyhold fine, or for an escape, or for money levied upon any writ of *fieri facias*,—shall be brought within *six* years (*s*). This enactment is, however, subject to exception in the case of any person

v. Boulton, 2 C. B. 476; Wainman *v.* Kynman, 1 Exch. 118; Bodger *v.* Arch, 10 Exch. 333; Walker *v.* Butler, 25 L. J. (Q. B.) 377; Turney *v.* Dodwell, 3 Ell. & Bl. 136; Maber *v.* Maber, Law Rep., 2 Exch. 153.

(*r*) See Coope *v.* Cresswell, Law Rep., 2 Ch. Ap. 116.

(*s*) There are also enactments of date prior to this statute, fixing six years as the period of limitation in certain cases not provided for by the statute of James. See 4 Ann. c. 16, s. 17, with respect to the recovery of *seamen's wages;* and 55 Geo. 3, c. 127, s. 5, with respect to the recovery of the value *of tithes.*

who, when entitled to sue, is under disability—as an infant, feme covert, or person *non compos* (*t*); and also to a proviso, that if any acknowledgment in writing be signed by the party liable or his agent, or payment or satisfaction made on account of any arrears of principal or interest, the person entitled to the action may bring the same within twenty years after such acknowledgment, payment or satisfaction (*u*). By 19 & 20 Vict. c. 97, s. 14, it is, however, provided, that where there are several co-contractors or co-debtors, none of them shall lose the benefit of the limitation given by the 3 & 4 Will. IV. c. 42, s. 3, by reason only of payment on account of any principal or interest by any of the others.

3. By statute 31 Eliz. c. 5, all suits and indictments upon any *penal statutes*, where the forfeiture is to the Crown alone, must be prosecuted within *two years* from the commission of the offence (*x*); where the forfeiture is to a common informer alone, within *one* year (*y*); where to the Crown and a common informer jointly, then by the common informer within one year, and by the Crown within two years after that year is expired. But this statute did not extend to penal actions at suit of the party grieved; and therefore by 3 & 4 Will. IV. c. 42, s. 3, it is required that these shall be brought within *two*

(*t*) In the cases in which a period of limitation is fixed by 3 & 4 Will. 4, c. 42, s. 3, "absence beyond seas" of the party entitled to sue, was also (by sect. 4) made a disability; but its character in this respect has now been abolished by 19 & 20 Vict. c. 97, s. 10.

(*u*) 3 & 4 Will. 4, c. 42, s. 5. See Forsyth *v.* Bristow, 8 Exch. 716.

(*x*) This statute extended also to all *informations* upon any penal statutes; but so much of it as "relates "to the time limited for exhibiting "an information for a forfeiture "upon any penal statute" is now repealed by 11 & 12 Vict. c. 43, s. 36; which Act, however, goes on to provide (sect. 11), that all informations for offences punishable on summary conviction shall be laid within *six calendar months* from the time when the matter arose, unless the time for the information has been otherwise specially limited. (See Re Edmondson, 17 Q. B. 67.)

(*y*) Chance *v.* Adams, 1 Ld. Raym. 78. (See Dyer *v.* Best, Law Rep., 1 Exch. 152.)

years after the offence shall have been committed, unless the particular statute which creates the forfeiture shall have expressly enacted otherwise.

4. By 5 & 6 Vict. c. 97, s. 5, it is enacted, that the period within which any action may be brought for any thing done under the authority, or in pursuance, of any *local or personal act of parliament*, shall be *two years*; or in case of continuing damage, then *one* year after such damage shall have ceased (*z*).

5. Lastly, by 11 & 12 Vict. c. 44, s. 8, it is provided, that no action shall be brought against any *justice of the peace* for anything done in the execution of his office, unless commenced within *six calendar months* after the act committed (*a*).

And thus much of the law of limitation—whether as regards entry or distress on land and actions for recovery of the realty, or as regards actions not brought for such recovery, but with some other object. Between which two classes of proceedings the following distinction is observable,—that as regards the former, the statute 3 & 4 Will. IV. c. 27, has, by its express provision, the effect of extinguishing the *right*, as well as barring the *remedy* (*b*); but as regards the latter, the limitation bars the remedy by action only. So that though I can bring no action to recover a debt on contract, after the expiration of the limited period, there is nothing to prevent my obtaining payment of it after that period in any other

(*z*) By 5 & 6 Vict. c. 97, s. 5, a general repeal is made of all prior enactments by which any *other* period of limitation is provided for any of the cases within the section.

(*a*) There are similar provisions contained in many different Acts, with respect to *constables* and other public officers acting in execution of their duties; but the period of limitation varies in the different cases. See 24 Geo. 2, c. 44, s. 8; 3 Geo. 4, c. 126, s. 147; 7 & 8 Geo. 4, c. 31, ss. 3, 12; 5 & 6 Will. 4, c. 50, s. 109; c. 76, s. 133; 8 & 9 Vict. c. 118, s. 165; 9 & 10 Vict. c. 95, s. 138; 11 & 12 Vict. c. 63, s. 139.

(*b*) 3 & 4 Will. 4, c. 27, s. 34.

manner—as, through the medium of any lien that I may hold on the property of the debtor (*c*).

We may also remark (in conclusion), with respect to actions the limitation of which is fixed by 21 Jac. I. c. 16, or by 3 & 4 Will. IV. c. 42,—that, though periods are limited within which the action shall in different cases be commenced, yet in favour of vigilant plaintiffs the law has provided a method of constantly keeping the right of action alive notwithstanding any lapse of time, (or, as it is commonly expressed of *saving* the Statute of Limitation); viz. by commencing an action and getting the writ of summons therein from time to time renewed, —that is, impressed by the proper officer of the court, with a seal bearing the date of such renewal. For by the 15 & 16 Vict. c. 76, s. 11, it was provided, that a writ, so periodically renewed, should suffice to prevent the operation of the Statute of Limitation, though nothing further be done in the meantime in the action (*d*).

(*c*) See Higgins *v.* Scott, 2 B. & Ad. 413.

(*d*) See Nazer *v.* Wade, 1 B. & Smith, 728. It is apprehended that no material difference in this practice will be rendered necessary by the Judicature Act, 1873 (36 & 37 Vict. c. 66).

CHAPTER X.

OF THE PROCEEDINGS IN AN ACTION.

WE have already, in preceding pages, turned our attention to the nature of the injuries which are cognizable either at law or in equity, and also to the general nature of the remedy by action (*a*);—and we are now to consider the *manner* in which that remedy is pursued and applied, and the course of proceedings which it involves. But as some of these proceedings are such that, according to the antient practice of the courts, they could be transacted only during particular periods of the year called *Terms*, —we will advert shortly to those forensic seasons, before we enter on the main business of the chapter.

[The Terms are supposed by Mr. Selden to have been instituted by William the Conqueror (*b*); but Sir H. Spelman hath clearly and learnedly shown, that they were gradually formed from the canonical constitutions of the Church,—being indeed no other than those leisure seasons of the year which were not occupied by the great festivals or fasts, or which were not liable to the general avocations of rural business. Throughout all Christendom, in very early times, the whole year was one continual Term for hearing and deciding causes. For the Christian magistrates, to distinguish themselves from the heathens who were extremely superstitious in the observation of the *dies fasti et nefasti*, went into a contrary

(*a*) Vide sup. bk. v., cc. VI. VII. VIII. (*b*) Jan. Ang. l. 2, s. 9.

[extreme, and administered justice upon all days alike: till at length the Church interposed, and exempted certain holy seasons from being profaned by the tumult of forensic litigations; as particularly the time of Advent and Christmas, which gave rise to the winter vacation; the time of Lent and Easter, which created that in the spring; the time of Pentecost, which produced the third; and the long vacation between Midsummer and Michaelmas, which was allowed for the haytime and harvest. All Sundays also, and some particular festivals, as the days of the Purification, Ascension, and some others, were included in the same prohibition; which was established by a canon of the Church, A.D. 517, and was fortified by an imperial constitution of the younger Theodosius, comprised in the Theodosian code (*c*).

Afterwards, when our own legal constitution came to be settled, the commencement and duration of our law Terms were appointed with an eye to those canonical prohibitions; and it was ordered by the laws of King Edward the Confessor (*d*), that from Advent to the octave of the Epiphany, from Septuagesima to the octave of Easter, from the Ascension to the octave of Pentecost, and from three in the afternoon of all Saturdays, till Monday morning, "the peace of God and of holy Church shall be kept "throughout all the kingdom." And so extravagant was afterwards the regard that was paid to these holy times, that, though the author of the Mirrour (*e*) mentions only one vacation of any considerable length,—containing the months of August and September,—yet Britton is express (*f*) that in the reign of King Edward the first, no secular pleas could be held, nor any man sworn on the Evangelists, in the times of Advent, Lent, Pentecost, harvest, and vintage, in the days of the great litanies, and in all solemn festivals. But he adds, that the bishops did

(*c*) Spelman, Of the Terms.
(*d*) C. 3, De Temporibus et Diebus Pacis.
(*e*) Cap. 3, s. 8.
(*f*) Cap. 53.

[nevertheless grant dispensations,—of which many are preserved in Rymer's *Fœdera* (*g*),—that assizes and juries might be taken in some of these holy seasons. And soon afterwards a general dispensation was established by the Statute of Westminster the first, (3 Edw. I. c. 51,) which declares, that "by the assent of all the prelates, *assize of* "*novel disseisin*, *mortancestor*, and *darreign presentment*, "shall be taken in Advent, Septuagesima, and Lent; and "that at the special request of the king to the bishops." The portions of time that were not included within these prohibited seasons, fell naturally into a fourfold division; and, from some festival day that immediately preceded their commencement, were denominated the Terms of St. Hilary, of Easter, of the Holy Trinity, and of St. Michael; which Terms were afterwards regulated and abbreviated by several acts of parliament (*h*).] Their present regulation depends on the statute 11 Geo. IV. & 1 Will. IV. c. 70, as amended by 1 Will. IV. c. 3.

At the time when the statute 11 Geo. IV. & 1 Will. IV. c. 70, was passed, Easter and Trinity Term depended on the *moveable* feasts of Easter and Trinity; but by the above Acts all the four Terms were newly regulated; it being provided that Hilary Term shall begin on the 11th and end on the 31st January; that Easter Term shall begin on the 15th April, and end on the 8th May; that Trinity Term shall begin on the 22nd May, and end on the 12th June; and that Michaelmas Term shall begin on the 2nd November, and end on the 25th. It was further enacted, that if the whole (or any number) of the days intervening between the Thursday before and the Wednesday next after Easter-day, should fall within Easter Term, such Term should be prolonged for such number of days of business as should be equal to the number of the intervening days before mentioned, exclusive of Easter-day; the

(*g*) Temp. Hen. 3, *passim*.

(*h*) Prior to these Acts, Trinity Term, in particular, had been regulated by 32 Hen. 8, c. 21; and Michaelmas Term, by 16 Car. 1, c. 6, and 24 Geo. 2, c. 48.

commencement of the ensuing Trinity Term to be in such case postponed, and its continuance prolonged for an equal number of days of business (*i*). And that in case the day of the month on which any Term was to *end* should fall on a Sunday, the Monday next after should be deemed to be the last day of the Term (*k*). The case of the day of the month on which the Term is to *begin* falling on a Sunday, was not provided for by these Acts. It has been decided, however, that, for the purpose of computation, the Sunday should in that case be considered as the first day of the Term; although, as the courts do not sit on a *dies non*, no judicial act can be done, or supposed to be done, till the following Monday (*l*).

With respect to the kind of proceedings conducted exclusively in Term, we may remark, that in general all sittings in *banc* have been of that character. But the sittings in the courts of *assize* and *nisi prius* (*m*) have been held for the most part in Vacation; that is, during the intervals between the Terms: and—with the exception of a period of recess, viz. from 10th August to 24th October,—all proceedings taking place between the parties or their solicitors, *out of court*, that is, not in the actual presence of the judges, have been usually transacted during vacations, as well as in Term time (*n*). But of late the

(*i*) 11 Geo. 4 & 1 Will. 4, c. 70, s. 6. See Wright *v.* Lewis, 9 Dowl. 183; Donnes *v.* Bostock, ibid. 241.

(*k*) 1 Will. 4, c. 3, s. 3.

(*l*) See Doe *v.* Roe, 1 Dowl. 63.

(*m*) Vide sup. pp. 348–351.

(*n*) The practice on this subject was formerly very different. All writs must have been made returnable in term; every pleading and every entry of judgment, even when in fact delivered or entered in vacation, must always have been intituled of some antecedent term; the plaintiff, though at liberty to *declare* in vacation, could not compel the defendant to plead until the subsequent term: and a party obtaining a verdict in vacation, on the trial of any issue, or any inquisition of damages, had also to wait in every case until the term next following, before he could sign final judgment, or take out execution. (See the Second Report of the Common Law Commissioners appointed in 1828, p. 28.)

It is to be noticed that under the Judicature Act, 1873, the vacations to be observed by the High Court

inconvenience to suitors which has arisen from the above restrictions has been strongly felt; and, accordingly, a provision has been inserted in the Judicature Act, 1873, to the effect that the division of the legal year into Terms shall be abolished so far as relates to the administration of justice; and that there shall no longer be Terms applicable to any sitting or business of the High Court of Justice, or of the Court of Appeal, or of any commissioners to whom any jurisdiction may be assigned under that Act; but in all other cases in which, under the law hitherto existing, the Terms into which the legal year is divided are used as a measure for determining the time at or within which any act is required to be done, the same may continue to be referred to for the same or the like purpose until provision otherwise made by lawful authority (*o*). And so much with respect to Terms—and we will now turn to the proper subject of the chapter, viz. the proceedings in an action, to which we are now to invite the reader's attention.

And in the first place we must premise that, according to the system hitherto in use, the term *action* has been exclusively used in reference to the remedy which has been afforded by one or other of the courts *of law* as distinct from that which has been sought in the Court of Chancery, or from one of the other courts which (as we have explained elsewhere) form the materials out of which the Supreme Court of Judicature is constituted (*p*). In such courts of law the proceedings have commenced by *writ of summons*, while in the Court of Chancery the regular proceedings have been commenced by *bill* or *information:* in the Court of Admiralty by a *cause in rem* or *in personam:* in the Court of Probate by a *citation:*

of Justice and the Court of Appeal may be fixed by her Majesty by order in council, on the recommendation of the "council of judges of the Supreme Court of Judicature" (as to which see 36 & 37 Vict. c. 66, s. 75); but in the meantime, and subject thereto, the vacations shall be fixed as at present. (Sect. 27.)

(*o*) Sect. 26.

(*p*) Vide sup. p. 319.

and in the Court for Divorce and Matrimonial Causes, and in the London Court of Bankruptcy, by a *petition*—each of these having a procedure of its own, and the remedy itself, except in the two last instances, being usually termed a *suit* (*q*). It is, however, obvious, that most of these proceedings might conveniently be called by the same name, commence in the same way, be carried on in general by the same procedure, and to a certain extent be governed by the same rules of practice. And, accordingly, the rules of procedure appended by way of schedule to the Judicature Act, 1873, provide, that though all *other* proceedings in and applications to the High Court of Justice may, subject to such rules of court as shall be made, be taken and made therein in the same manner as they would have been taken and made in any court if that Act had not passed,—all actions which have been hitherto commenced by writ in the courts of common law, and all suits hitherto commenced by bill or information in the Court of Chancery, or by a cause *in rem* or *in personam* in the Court of Admiralty, or by citation or otherwise in the Court of Probate, shall be instituted in the High Court of Justice by a proceeding to be called "an action," and shall be commenced by a writ of summons (*r*).

The phraseology and the form of remedy hitherto in use in the courts of law having been thus deliberately selected by the legislature for nearly uniform adoption from among the modes of procedure which obtained in the various courts (*s*), we propose in the present chapter

(*q*) The terms, "action" and "suit at law," are both commonly used in speaking of the remedy afforded by a court of law; and it is provided by the Judicature Act, 1873, that in the construction of that Act, unless there is anything in the subject matter or context repugnant thereto, the word "suit" shall include "action" (36 & 37 Vict. c. 66, s. 100); and that the word "cause" shall include any action, suit or other original proceeding between a plaintiff and a defendant, and any criminal proceeding by the Crown. (Ibid.)

(*r*) 36 & 37 Vict. c. 66, sched. Rules of Procedure, rr. 1, 2.

(*s*) It will be noticed that the remedy by way of *petition* in the

to present the reader with a general account of the proceedings in an action in the High Court of Justice, so far as the same can be drawn from the system hitherto in use in the superior courts of law. And in so doing we shall endeavour to point out how such proceedings will be affected by the Judicature Act, 1873, and the rules of procedure thereto annexed (*t*).

The most natural and perspicuous way of considering the course of an action will be to pursue the order and method wherein the proceedings themselves follow each other, rather than to distract and subdivide the subject by any more logical analysis. And the regular and orderly parts of an action are these: I. The process; II. The pleadings; III. The trial and evidence; IV. The judgment; V. The proceedings by way of appeal; VI. The execution.

I. To begin, then, with the *process*:—

The first object in an action, is to procure the defendant's *appearance* in court. The term *appearance*, (whether applied to plaintiff or defendant,) has reference to an antient state of practice, by which the litigant parties personally, or by their respective attornies, actually confronted each other in open court. But their appearance has for centuries past ceased to be an actual one; and as regards the plaintiff, no particular form is now used

proceedings for divorce and in bankruptcy, being still retained — the adoption of the remedy by action is not *entirely* uniform.

(*t*) In the present work no attempt is made to furnish the reader with full instruction on mere matters of *practice*. As to these he must seek for information in the Treatises which are compiled for that purpose; and it may be here incidentally remarked that the Judicature Act, 1873, and the Rules of Procedure appended thereto, leave much to be done in matters more or less of detail by General Rules, from time to time to be made by the judges, in order to carry out its provisions. It must, moreover, be borne in mind by the reader, that most of the provisions introduced by the Judicature Act, 1873, and mentioned in the text, will not come into actual operation until the commencement of that Act on 2nd November, 1874.

in substitution for it; but as regards the defendant, the form is observed of his delivering to the proper officer of the court, a memorandum importing either that he appears in person, or that some solicitor, whose name is given, appears on his behalf—a practice that obviously secures the important object, of protecting defendants from the danger of having a judgment obtained against them by surprise. This appearance is previously commanded by a *writ*, (or mandate from the sovereign,) which is termed, in technical language, the *process* in the action.

The process in antient times comprised a variety of different writs, of different degrees of stringency, issued consecutively upon each other, where the first for any reason failed to be effectual (*u*). But it always began with an *original writ;* which was an instrument issued out of Chancery, in the name of the sovereign, under the Great Seal, (instead of being merely under the seal of the court of common law itself, as was usual with other process,) commanding the sheriff to require the defendant to appear in the court of common law, to answer to some particular cause of action in the writ set forth. This mode of commencing a suit, was antiently in universal use, and is a practice of remote antiquity. We may also take occasion to remark here, that great technical importance used to attach to a writ of this description. For as it had constituted from time immemorial the first step in the action, and always set forth, (in general or special terms according to the nature of the case,) the circumstances upon which it was founded, it had incidentally the effect of defining the scope and number of our legal remedies themselves; it being held that no action would lie unless the case was one for which a precedent could be found, in the *Register of Original Writs.* Thus the law of writs,

(*u*) All these writs fell under the common term of the *process;* and those subsequent to the first or original writ, were also called the *mesne process*,—to distinguish them from the original writ, and also from writs of execution, which were termed *final process.*

(that is, of original writs,) became in effect identical with that of actions; and the same remedy was described indifferently as a *writ* of trespass, (for example,) or of dower,—or an *action* of trespass, or of dower. In course of time, however, new modes of commencement were devised, by connivance of the judges, in order to avoid the expense of an original writ, (for which a fine or fee, of considerable amount, was in many cases payable to the crown); and with the view, also, of enabling the Queen's Bench and Exchequer to effect that encroachment or usurpation on the jurisdiction of the Common Pleas, to which we have referred in a former part of this volume (*x*). We shall not encumber our text with any attempt to explain the nature of these devices, or the manner in which they severally operated, which have now become matters of mere curiosity. It will suffice to say that they had the effect of irregularly introducing, into each of the superior courts of common law, the use of a variety of writs of different descriptions by way of alternatives for the antient course of suing out an original writ under the Great Seal; and that the result of this was, at length, to involve the first stages of an action in great and unnecessary complexity. The Commissioners appointed in 1828 for inquiry into the course of proceedings at common law, having been consequently led to recommend the adoption of a simple and more uniform system, an act of parliament (2 Will. IV. c. 39) was passed for the purpose (*y*).

But this system, though it comprised many capital improvements, was afterwards thought to have been too moderate and cautious in its deviations from the antient course; and was therefore itself amended (at the suggestion of a succeeding commission), by the 15 & 16 Vict. c. 76 (called the Common Law Procedure Act, 1852); and still further alterations were subsequently made by

(*x*) Vide sup. pp. 333, n. (*e*), 338, n. (*q*).

(*y*) See the First Report of the Common Law Commissioners appointed in 1828.

17 & 18 Vict. c. 125, (called the Common Law Procedure Act, 1854,) and by 23 & 24 Vict. c. 126—called the Common Law Procedure Act, 1860 (*z*).

According to the method of proceeding established by these Acts,—which in part retained, and in many important respects innovated upon, the antecedent practice,—an action was directed to be commenced by a writ of summons in a prescribed form—viz. by a writ issued in the queen's name, directed to the intended defendant, describing him as of the county and place where he is supposed to reside or be, and commanding him to cause an *appearance*, (a term already explained,) to be entered for him in court, in an action at the suit of the plaintiff, within a certain period after the writ shall be *served* upon him, the defendant (*a*). It is also endorsed with the name and place of abode of the plaintiff's solicitor; and, where he is agent for another solicitor, with the name and place of abode of the latter (*b*); or if no solicitor is employed,

(*z*) The provisions of these Acts may be applied to any court of record in England or Wales, to which the Crown, by order in council, may from time to time, think proper to apply the same; and many of their enactments have accordingly in fact been applied to particular local courts and to the county courts generally. It may be here observed that the "Common Law Procedure Acts" are not by name referred to in any part of the Judicature Act, 1873, or in the rules of procedure thereto annexed. It is apprehended that where consistent with that statute and the rules to be made under it, their provisions will remain in force after the Judicature Act comes into operation. (See 36 & 37 Vict. c. 66, s. 76.)

(*a*) See 15 & 16 Vict. c. 76, s. 2, sched. (A.)

(*b*) Under the Judicature Act, 1873, *district registries* are to be established in the country, in such places and districts as shall be defined by order in council, from which may be issued writs of summons, and other proceedings taken, such as shall be prescribed by rules of court or special order, down to and including entry for trial, or (in case of non-appearance by defendant) down to and including entry of final judgment. The proceedings, however, on the application of any of the parties may be directed by the High Court or a judge at chambers to be removed from the district registry to the proper office of the High Court; and, on the other hand, accounts and inquiries may be referred to the district registrar. (See 36 & 37 Vict. c. 66, ss. 60–66.)

then with a memorandum that it has been sued out by the plaintiff in person, mentioning particularly his place of residence (*c*). Under the Judicature Act, 1873, it is also required to be endorsed with a statement of the nature of the claim made, or of the relief or remedy required in the action, and specifying the division of the High Court to which it is intended by the plaintiff that the action shall be assigned (*d*). Moreover, if it be for payment of any *debt*, the amount of the debt and costs claimed is to be endorsed thereon, with a notice that if the amount be paid to the plaintiff or his solicitor within a certain time from the service, further proceedings will be stayed (*e*). And it is in the option also of the plaintiff in any case where his claim is merely for a debt, or liquidated demand in money (with or without interest) arising upon a contract express or implied, to make a *special* indorsement of the *particulars* of the claim, after giving credit for any payment or set-off (*f*).

(*c*) 15 & 16 Vict. c. 76, s. 6.

(*d*) 36 & 37 Vict. c. 66, sched. r. 2. The plaintiff is enabled to assign his cause or matter to any one of the divisions of the High Court, or (not being the probate, divorce and admiralty division) as he may think fit; but, if he assigns it improperly, according to the rules of court and the provisions of that Act, it may at any stage be ordered to be transferred to the proper division, and this either on or without the application of the parties. (Sect. 35.)

(*e*) 15 & 16 Vict. c. 76, s. 8. The defendant is at liberty, however, notwithstanding such payment, to have the costs *taxed;* and if more than one-sixth is disallowed, the plaintiff's solicitor will have to pay the costs of taxation. (Ibid.) With respect to the endorsements mentioned in the text, it is to be observed that their omission does not render the writ *void*. It is only an irregularity, rendering the writ liable to be set aside or amended. (Sect. 20.)

(*f*) 15 & 16 Vict. c. 76, s. 25; 36 & 37 Vict. c. 66, sched. r. 7. The cases in which this special indorsement may be made, are thus exemplified in this last enactment: "a bill of exchange, promissory note, cheque, or other simple contract debt, or on a bond or contract under seal for payment of a liquidated amount of money, or on a statute where the sum sought to be recovered is a fixed sum of money, or in the nature of a debt, or on a guarantee, (whether under seal, or not,) where the claim against the principal is in respect of such debt or liquidated demand, bill, cheque or note, or on *a trust*." (Ibid.)

In suing out the writ, care of course should be taken that it is between the proper *parties;* in other words, that it should purport to be a writ between such persons as ought to be respectively plaintiff or plaintiffs, defendant or defendants; as to which the rule has hitherto been, that *all* such persons, and on the other hand *no other* such person, must be joined. A mistake, however, in this matter, though it may cause expense to the plaintiff, will not, for the future, defeat the action (*g*); for it forms one of the rules of procedure under the Judicature Act, 1873, that no action shall be defeated by reason of the misjoinder of parties, but the court may deal with the matter in controversy, so far as regard the rights and interests of the parties actually before it; and may at any stage of the proceedings order any parties either to be struck out as plaintiffs or defendants, or may add any parties who ought to have been joined or whose presence may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the action (*h*).

This writ of summons remains in force for a certain fixed period; at any time before the expiration of which, supposing the writ not to have been yet served, it may be *renewed* (in order to keep the suit alive) for a similar period; and such renewal may be repeated as often as there may be occasion, all renewals being effected by the simple method of procuring a stamp to be impressed upon

See as to the construction of the former provision (which was nearly in the same words), Rogers *v.* Hunt, 10 Exch. 474; Rodway *v.* Lucas, ibid. 665.

(*g*) A wrong joinder of parties, was at one period often a ground for fatal objection. But it was provided by 23 & 24 Vict. c. 126, s. 19, that the *joinder of too many plaintiffs* should not be fatal, but judgment should be given in favour of one or more of them,—the defendant being entitled, though unsuccessful, to his costs occasioned by such joinder. (As to the construction of this enactment, see Bellingham *v.* Clark, 1 B. & Smith, 332.)

(*h*) See 36 & 37 Vict. c. 66, sched. rr. 9—17.

it by the proper officer (*i*). One or more *concurrent* writs may also be issued at any time within the first period, and will remain in force to the end thereof, and are capable, like the primary one, of being renewed; these being in the same form with the primary one, except that they have the word "concurrent" impressed upon them by the proper officer (*k*),—and being intended for the convenience of a plaintiff, who, in the case of joint defendants residing in different places, or of a sole defendant whose residence is unknown, may wish to be supplied with several writs of the same tenor, with a view to contemporaneous service, or attempts at service, in different localities (*l*).

The writ, either primary or concurrent, (duly renewed, if renewal has become necessary,) must, as the general rule, not only be served on the defendant, but the service of it must, (where practicable,) be a *personal* one (*m*); that is, a copy of the writ must be left with him, showing him at the same time the writ itself, if he so requires (*n*). But the writ need not be served when the defendant by his solicitor agrees to accept service, and enters an appearance (*o*). And in other cases, if it be made to appear

(*i*) 15 & 16 Vict. c. 76, s. 11. (See Black *v.* Green, 15 C. B. 262; Anon. 1 Hurl. & C. 664.) The stamp should bear upon it the *date* of the renewal.

(*k*) Sect. 9. The stamp should bear upon it the *date* of issuing the concurrent writ.

(*l*) By sect. 14, the writ of summons may be served in any county.

(*m*) 15 & 16 Vict. c. 76, s. 17; 36 & 37 Vict. c. 66, sched. r. 5.

(*n*) As to what amounts to personal service, see Goggs *v.* Lord Huntingtower, 12 Mee. & W. 503; Christmas *v.* Eicke, 6 D. & L. 40. If the writ be issued against a corporation aggregate, it may be served on the mayor or other head officer, or on the town clerk, clerk, treasurer, or secretary of the corporation. If against the inhabitants of a hundred or other like district, on the high constable or one of the high constables. If against the inhabitants of any franchise, liberty, city, town or place not being part of a hundred or other like district, on some peace officer thereof. (15 & 16 Vict. c. 76, s. 16. See Walton *v.* Universal Salvage Company, 16 Mee. & W. 438.)

(*o*) See 36 & 37 Vict. c. 66, sched. r. 4.

to the court or a judge that the plaintiff is, from any cause, unable to effect prompt personal service, the court or judge may make such order for substituted or other service, or for the substitution of notice for service as may seem just (*p*). Moreover, whenever it appears fit to the court or a judge in a case in which the cause of action has arisen within the jurisdiction, or is properly cognizable against a defendant within the jurisdiction, that any person *out* of the jurisdiction should be served, such manner of service, or such notice in lieu of service, may be ordered on such terms as shall seem just (*q*).

Supposing personal service to be effected, and no appearance to be entered by the defendant pursuant to the exigency of the writ,—or supposing an order dispensing with personal service to be obtained, and no appearance entered,—then, in either case, if the writ has a *special indorsement of particulars*, (which it will be recollected can only be if the claim be merely for a debt or liquidated sum of money,) the plaintiff is entitled to sign final judgment as *for want of appearance* (*r*). And this judgment

(*p*) 36 & 37 Vict. c. 66, sched. r. 5. As to the practice as to substituted service under the previous provision contained in 15 & 16 Vict. c. 76, s. 17, see Kitchen *v.* Wilson, 4 C. B. (N. S.) 483; Davies *v.* Westmacott, 7 C. B. (N. S.) 829.

(*q*) 36 & 37 Vict. c. 66, sched. r. 6.

(*r*) 15 & 16 Vict. c. 76, s. 27; 36 & 37 Vict. c. 66, sched. r. 7. Prior to the first of these enactments it was an invariable rule in every personal action, that, until the defendant had *appeared*, no judgment in the action could be awarded. But if he failed to appear after a personal service had been effected, the plaintiff might have caused an appearance to be entered for him (commonly known as an appearance *sec. stat.*, it having been authorized by 12 Geo. 1, c. 29); and where a personal service proved impracticable, the plaintiff might have obtained leave to take out a writ of *distringas* against his goods and chattels; and where the defendant had no goods capable of being seized, and was returned *non est inventus*, the plaintiff might have resorted to process of *outlawry* against him; and under this process, if the defendant, after being duly *exacted* and *proclaimed* became an *outlaw*, all property that he might have was forfeited and seized into the hands of the Crown; and the Court of Exchequer would make an order to apply it in satisfaction of the plaintiff's claim. As judgment may now be signed *for want of appearance*,

may be for any sum not exceeding the sum endorsed on the writ, together with interest at the rate specified, (if any,) to the date of the judgment; and with a regulated sum for costs: or if the plaintiff be not content with the regulated costs, then such amount of costs as the court shall tax in the particular case (*s*). And (under the Judicature Act, 1873) in cases in which the writ is thus specially indorsed, the plaintiff, if the defendant shall appear, may, on filing an affidavit verifying the cause of action and swearing that in his belief there is no defence to the action, call on the defendant to show cause before the court or a judge why final judgment should not be signed; and the court or judge may order judgment to be so signed, unless satisfied that there is a good defence on the merits, or unless sufficient facts be disclosed to allow the action to be defended (*t*).

But if, on the other hand, the writ be not specially indorsed, and if an appearance be duly entered by the defendant, and he does not at the time dispense with such a step—the plaintiff must in the next place proceed to file in court and also deliver to the defendant a printed statement of his complaint, and of the relief or remedy to which he claims to be entitled.

process of outlawry in the case above described is no longer necessary (see 15 & 16 Vict. c. 76, s. 24).

(*s*) Sect. 27; 36 & 37 Vict. c. 66, sched. r. 7. (As to *interest* in such cases, see Rodway *v.* Lucas, 10 Exch. 665.) Under such circumstances, however, the defendant may, even after final judgment has been signed, be let in to defend, upon an application supported by satisfactory affidavits, accounting for the non-appearance, and disclosing a defence upon the merits. (15 & 16 Vict. c. 76, s. 27.) As to this application, see Whiley *v.* Whiley, 4 C. B. (N. S.) 653.

(*t*) 36 & 37 Vict. c. 66, sched. r. 7. In all cases of ordinary account, (as in the instance of a partnership, or executorship, or ordinary trust account,) where the plaintiff in the first instance desires to have an account taken, the writ shall be endorsed with a claim that such account be taken; and in default of appearance and after appearance, unless the court be satisfied by the defendant that there is a preliminary question to be tried, an order for the account claimed shall be made "with all directions now usual in the Court of Chancery in similar cases." (Rule 8.)

And as this statement is the first of a series of mutual allegations which the parties are allowed to interchange with the view to the development of the point in controversy between them, (which allegations are technically called *pleadings*,) we have thus arrived at the second stage of the action.

It will, however, be proper to advert here to a collateral incident, which may occur in the case of a defendant resident within the jurisdiction, at the time that the writ issues, but who is suspected of an intention to quit England before final judgment can be obtained. Under such circumstances, then, under "The Debtors Act, 1869," if the plaintiff can show upon affidavit, to the satisfaction of a judge of the court, that he has a good cause of action against any defendant to the amount of 50*l.* or upwards, or has sustained damage to that amount, and that there is probable cause for believing that such defendant is about to quit England, unless he be apprehended, and that his absence from England will materially prejudice the plaintiff in the prosecution of his action,—the judge may make an order that the defendant be arrested and imprisoned for a period not exceeding six months, or until he has given the prescribed security, not exceeding the amount claimed in the action, that he will not go out of England without the leave of the court (*u*). This order may be obtained *ex parte* at any time between the commencement of the action and final judgment: and it directs the sheriff of the county in which the action is to be tried to arrest the defendant; who remains in custody on such arrest for the time ordered, or until he shall have either given a bond to the plaintiff with two or more sureties (*x*), or some

(*u*) 32 & 33 Vict. c. 62, s. 6. If the action be for a penalty (not in respect of a contract), the prejudice to the plaintiff from the absence of the defendant need not be proved, and the security required is, that the judgment recovered shall be paid, or the defendant rendered to prison. (Ibid.)

(*x*) Ibid. As to proceedings against the bail, see Betts *v.* Smyth, 2 Q. B. 113.

other satisfactory security, or shall deposit in court a sum mentioned in the order by way of security (*y*). But it is now time to return to the progress of the action.

II. By the "Common Law Procedure Act, 1852," (15 & 16 Vict. c. 76,) great alterations were introduced into the course of the *pleadings* in an action previously in use; the object of the reform being to establish a method built indeed on the old foundations, but with an improved design as regards the objects of simplicity and despatch (*z*). Under "The Judicature Act, 1873," the rules of pleading have been again remodelled so as to adapt them to the requirements of a tribunal, which, as already explained, has drawn to itself not only the jurisdiction of the superior courts of law, but also that of other courts which were created to administer relief distinct in its nature from that afforded by an action at law.

The general result, however, contemplated by the new method is still, (as it used to be,) the development of the point in controversy between the parties, in order that, if it should turn out to be matter of law or equity, it may

(*y*) Reg. Gen. Mich. T. 1869, rr. 6—11, et sched. (C.) This practice is in lieu of the *capias ad respondendum*, under which an absconding defendant was formerly arrested or obliged to give *special bail*. See the following cases, which will still be useful *mutatis mutandis*:—Gibson *v.* Spalding, 11 Mee. & W. 173; Arkenheim *v.* Colegrave, 13 Mee. & W. 620; Daniels *v.* Fielding; Graham *v.* Sandrienelli; Talbot *v.* Bulkeley, 16 Mee. & W. 191, 200; Hargreaves *v.* Hayes, 5 Ell. & Bl. 272; Burns *v.* Chapman, 5 C. B. (N. S.) 481; Stein *v.* Valkenhuysen, 1 Ell. Bl. & Ell. 65.

(*z*) From a period of very remote antiquity down to the time of passing the above Act, the "pleadings" were of a highly artificial character, and had been elaborated, by the care of judges and practitioners during many successive centuries, into a regular system or science called *pleading*, or more properly *special pleading*, which constituted a distinct branch of the law, with treatises and professors of its own. It was a system highly rated by our antient lawyers, and had at least the merit of developing the point in controversy, with the severest precision. But its strictness and subtlety were a frequent subject of complaint; and one object of the 15 & 16 Vict. c. 76, was to relax and simplify its rules.

be referred to the decision of the judges of the court; or if matter of fact, to trial by jury, or such other method as the law may have provided for the trial of a question of that particular kind. When this result is attained, the parties are said to be *at issue*, (*ad exitum*,) or at the end of their pleading; and the emergent question itself is termed *the issue;* and, according to the nature of the case, may turn out to be either an *issue in law* (or *in equity*) or an *issue in fact* (*a*).

The manner in which the parties are thus brought to issue, remains also in substance the same as formerly, though in many respects simplified. A general idea of it may be obtained from the following explanations.

First, we may remark, that the pleadings or mutual allegations always consist of matter of *fact*, and of fact only—for all matters of *law* or of *equity* are judicially noticed by the court, and supposed to be known by the adverse party also, or to the pleader who conducts the altercation for him: and therefore the allegations on either side, of the facts respectively relied upon, will always suffice to develope the legal or equitable positions which apply to the case between the parties, and the questions of law or equity, (if any,) which are in dispute between them. It is also a rule of the same general nature, that, in their allegation of fact, the pleaders are to abstain from any statement of the *evidence* by which the fact is to be established; for matter of evidence, though essential for the consideration of the jurors, (or other persons,) by whom the issue or question of fact is to be tried, is superfluous so far as the object of pleading is concerned,—which is merely to ascertain whether the question is matter of fact

(*a*) It has been thought more convenient, in the general account of an action given in the text, to confine the attention of the reader to the *legal* and *equitable* jurisdiction of the Supreme Court of Judicature. Such notices, as are consistent with our limits, have been given elsewhere in this work, of its admiralty, probate, divorce and bankruptcy jurisdiction.

or matter of law (or of equity), and if of fact, to develope it in a shape sufficiently precise to show its general nature and import—but not to determine on which side of the question the truth lies, that being the province, not of pleading, but of trial (*b*).

These principles being premised, we may proceed to a general examination of the nature and order of the pleadings themselves.

The first of these is the plaintiff's *statement of his complaint*, and of the relief or remedy to which he claims to be entitled (*c*). This, as well as every subsequent pleading, should be *intituled* of the division of the High Court to which it is assigned, and of the day of the month and year when pleaded (*d*). In this statement also (under "The Judicature Act, 1873"), if the plaintiff proposes to have the action tried elsewhere than in Middlesex, he must name the county or place in which he proposes that the action shall be tried; and the action shall, unless a judge otherwise orders, be tried in the county or place so named (*e*); and when no place of trial is named in the statement of claim, it shall, unless a judge otherwise orders, be the county of Middlesex (*f*). Under the practice hitherto in use, the venue in every *local* action must be the county wherein the cause of action really arose, although in transitory actions he is even now allowed to lay the venue

(*b*) It may also be here remarked, that the rules of pleading given in the schedule to the Judicature Act, 1873, direct that the respective statements of plaintiff and defendant shall be as brief as the nature of the case may admit; that such costs as are occasioned by any unnecessary prolixity shall be borne by the party offending; and that the court or a judge may strike out or amend anything scandalous in such statements, or which tends to prejudice, embarrass or delay the fair trial of the action. (36 & 37 Vict. c. 66, sched. r. 18.)

(*c*) Ibid. Under the system of common law pleading in force prior to the commencement of the Judicature Act, 1873, on the 2nd November, 1874, this statement on the part of the plaintiff has been known as the *declaration* (*narratio*) in the action.

(*d*) See 15 & 16 Vict. c. 76, s. 54.

(*e*) 36 & 37 Vict. c. 66, sched. r. 28.

(*f*) Ibid.

where he pleases, subject to the right of the defendant to apply to have the *venue changed*. But it forms one of the rules of procedure annexed to "The Judicature Act, 1873," that "there shall be no local venue for the trial of any action" (*g*). The statement of the plaintiff then proceeds to allege, as briefly as is consistent with the nature of the case, the circumstances of his complaint or claim,—so as to show him entitled to maintain one of those legal actions the incidents of which we have elsewhere explained, or to have such equitable relief or remedy as the Court of Chancery has been accustomed to administer (*h*).

After the plaintiff has delivered this statement, it is the defendant's turn to consider in what manner it shall be encountered; and he is to address himself to this subject in the following manner. If the matter it contains, appear on the face of it substantially insufficient in point of law, or of equity, to entitle the plaintiff to the claim, relief, or remedy he seeks, the defendant's course is to *demur;* that is, to deliver a written formula, called a *demurrer*, (from *demorari,*) importing that he denies such sufficiency, and will wait the judgment of the court whether he is bound to answer (*i*). If, on the other hand, the plaintiff's state-

(*g*) 36 & 37 Vict. c. 68, sched. r. 28.

(*h*) Vide sup. p. 499, n. (*a*). It is to be observed that where the action is for a debt or liquidated demand, and no "special endorsement" is upon the writ of summons, it has been the practice that there should be delivered collaterally with the plaintiff's statement, and at the same time with it, the *particulars of the plaintiff's demand*, containing a more detailed account of the nature and amount of his claim than that endorsed on the writ. But where there has been a special endorsement of particulars on the writ of summons, no other particulars have been required than those so endorsed.

(*i*) It is one of the rules of pleading given in the schedule annexed to the Judicature Act, 1873 (r. 18), that "a demurrer to any statement may be filed in such manner and form as may be prescribed by rules of court." Before the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), a demurrer was either *general* or *special;* that is, it either objected in general terms only, or set forth a particular objection. And by 27 Eliz. c. 5, and 4 Ann. c. 16, it had been provided, that all objections of

ment appears *ex facie* sufficient in point of law or equity, the defendant's course is to file in court, and also deliver to the plaintiff, a printed statement of his defence, the general object of which, is to make answer in point of *fact* to the declaration (*k*). If he neither demurs nor makes defence within the time allowed by the practice of the court for that purpose, the plaintiff will be entitled to sign judgment against him as for such his default.

The defence (or plea) may be either *dilatory* or *peremptory*. Dilatory pleas,—which by statute 4 Ann. c. 16, cannot be received unless supported by affidavit of their truth (*l*),—are founded on some matter of fact not connected with the merits of the case, but such as may exist without impeaching the right of action itself; and such pleas are either *to the jurisdiction*, showing that, by reason of some matter therein stated, the case is not within the jurisdiction of the court; or of *suspension*, showing some matter of temporary incapacity to proceed with the suit; or *in abatement*, showing some matter for *abating* the action. The effect of such a dilatory plea, if established, is, that it defeats the particular action, leaving the plaintiff at liberty to commence another in a better form, if the case should be such as to admit of an amendment of that description (*m*). On the other hand, peremptory pleas,

mere form were to be raised in the shape of special, and not of general, demurrer. But under 15 & 16 Vict. c. 76, s. 51, no pleading was to be deemed insufficient for any defect which could theretofore only be objected to by special demurrer.

(*k*) 36 & 37 Vict. c. 66, sched. r. 18. Such statement on the part of the defendant has been hitherto called his *plea*, and the term, though not used in the rules of procedure annexed to the Judicature Act, 1873, may (it is submitted) be conveniently retained.

(*l*) This affidavit may be waived by the plaintiff. (Graham *v.* Ingleby, 4 Exch. 651.)

(*m*) It forms, however, one of the provisions of the Judicature Act, 1873, that an action shall not abate on the marriage, death, or bankruptcy of any of the parties, if the cause of action shall survive or continue, and shall not become defective by the assignment, creation, or devolution of any estate or title *pendente lite*. (36 & 37 Vict. c. 66, sched. r. 17.) The rule proceeds to provide that the "successor in interest" may be made party to the action by the court or a judge, and

(which have more usually been called pleas *in bar*,) are founded on some matter tending to impeach the right of action itself; and their effect consequently is to defeat the plaintiff's claim altogether, or to show that he is not entitled to the equitable relief or remedy which he seeks.

Pleas in bar are subject also to various divisions. For, first, they comprise the class of *general issues*, which are denials of the whole matter in the plaintiff's statement, or at least of the principal fact upon which his complaint is founded,—as in trespass or trespass on the case, that the defendant is *not guilty* (*n*); in debt on bond or other deed, that *it is not his deed*; in other cases of debt, that he *never was indebted as alleged*; in assumpsit, that he *did not promise as alleged*;—while all other pleas in bar are distinguished from these general issues, by the term of *special pleas*. Again, pleas in bar are distinguished from each other, according to their subject-matter, as pleas in *justification*, (or *excuse*,) and pleas *in discharge*. A plea in justification or excuse, is one that tends to show that there was *never* any right of action;—as where, in trespass for assault and battery, the defendant pleads *son assault demesne*, viz. that it was the plaintiff's own original assault; or in an action on the case for slander, that the words, alleged to have been spoken of the plaintiff, are true. But pleas in discharge are those which show that the cause of action, though once existing, has been barred by matter subsequent; as by payment, or release, or accord and satisfaction, or by a statute of limitation, or a *set-off*. And under "The Judicature Act, 1873," it is provided, that a defendant may set off, or set up by way of counter-claim, any right or claim, whether sounding in damages or not; and such set-off or counter-claim shall have the same effect

the action continued by or against him, or otherwise disposed of as may be just. But it should be borne in mind that it is not *every* action the cause of which survives the death of the plaintiff. (Vide sup. pp. 369, 370.)

(*n*) As to the plea of "not guilty" by *statute*, see Edwards *v.* Hodges, 15 C. B. 477.

as a statement of claim in a cross action, so as to enable the court to pronounce a final judgment in the same action, both on the original and on the cross claim; and where the set-off or counter-claim is established, the court may, if the balance be in favour of the defendant, give him judgment for that amount, or may otherwise adjudge to him such relief as he may be entitled to on the merits of the case (*o*).

With respect to all pleas in bar, however, it has been always a fundamental rule, that they must either *traverse*, —that is, deny,—the matter of fact in the plaintiff's statement, or *confess and avoid* it; that is, admitting it to be true, show some new matter of fact tending to obviate or take off its legal or equitable effect (*p*). Thus, the general issue of *not guilty*, in an action for assault and battery, denies the act of violence alleged; while, on the other hand, the plea of *son assault demesne*, in the same action, confesses that act, but *avoids* it by showing circumstances of excuse or justification. So in an action for money payable for goods bargained and sold by the plaintiff to the defendant, the general issue of *never indebted* traverses the bargain and sale; a plea of payment confesses both, but *avoids* them by showing matter of discharge. And a defence that does not conform to this rule, will in general be insufficient in substance, so as to entitle the defendant

(*o*) 36 & 37 Vict. c. 66, sched. rr. 20, 21. This plea of set-off answers very nearly to the *compensatio* or *stoppage* of the civil law. (Ff. 16, 2, 1.) It was not allowed at the common law, but is given by 2 Geo. 2, c. 22, s. 13, and 8 Geo. 2, c. 24; but under those statutes it was allowed only in actions for a liquidated demand, and must consist only of a liquidated demand on the part of the defendant.

(*p*) It may be noticed here that prior to the alterations effected by the Judicature Act, 1873, the courts of law were enabled by the Common Law Procedure Act, 1854, to give their judgments in certain cases and on certain conditions in accordance with the doctrines of *equity* as distinct from *law;* for it was thereby provided, that in any action in which if judgment were obtained against the defendant, he would be entitled to relief therefrom upon *equitable* grounds, he might plead the facts which entitled him to such relief, by way of defence to the action itself. (See 17 & 18 Vict. c. 125, s. 83.)

to *demur*. There have, however, been always some exceptions to the rule. Thus the defendant, in an action for a debt or liquidated demand, may avail himself of a plea of *tender;* that is, he may plead that he has been always ready to pay the debt demanded, and before the commencement of the action tendered it to the plaintiff, and now brings it into court, ready to be paid to him;—or he may, in most actions, resort to a plea of *payment of money into court;* viz. that he brings a certain sum of money into court, ready to be paid to the plaintiff, and that it is enough to satisfy the plaintiff's claim (*q*); or in any action, he may have occasion to plead by way of *estoppel* (*r*); as that the plaintiff ought not to be permitted to make a particular allegation, because he has formerly done some solemn act, (as by deed under his hand and seal,) involving an assertion to the contrary. As to all which defences, it is evident that they are in the nature of exceptions to the general rule above stated. For in the two first, (admitting, as they do, the right of action,) there is a confession, without avoidance; and in the last, there is neither traverse, confession, nor avoidance (*s*).

(*q*) The effect of this plea (as to which, see 3 & 4 Will. 4, c. 42, s. 21; 15 & 16 Vict. c. 76, ss. 71, 72; 23 & 24 Vict. c. 126, ss. 23—25), is, that it puts the plaintiff to the alternative of either accepting the proposed sum, or proceeding at his peril so far as future costs are concerned. But it has not been allowed in actions for assault and battery, false imprisonment, libel (except in the particular case mentioned, sup. p. 383,) slander, malicious arrest or prosecution, or debauching the plaintiff's daughter or servant.

(*r*) As to estoppel, vide sup. vol. I. p. 482, n. (*d*).

(*s*) At the time of passing the Common Law Procedure Act, 1852, (15 & 16 Vict. c. 76,) it was a rule that the defendant could not plead *specially* such matter as amounted in effect to the general issue, but must plead the general issue in terms; it being, at that time, essential to the nature of a special (or affirmative) plea, that the matter of it should be such as to give *colour* to the plaintiff's claim,—so that a plea that gave no colour ought to be by way of traverse. Thus, if, in an action of trespass, the defendant's case was that he claimed by feoffment with livery from A., by force of which he entered on the lands in question, he could not plead the matter in that form, because it would

The statement of defence (or plea) being filed and delivered, it is then to be encountered by the plaintiff, upon peril that, if he fail to do so within the proper period, the defendant is entitled to sign judgment by default. In encountering the plea, the plaintiff is put to the same alternative as the defendant was with regard to the plaintiff's statement; that is, he must either demur for substantial insufficiency in law or equity, or plead some matter of fact (*t*). If the plaintiff pleads he must file and deliver to the defendant a printed statement of his *reply* (*u*); and to this also the same alternative applies that was before noticed in the case of the plea, viz. that it must either traverse the last pleading, or confess and avoid it. But here also, as in the case of the plea, may occur an occasional exception to the regular course; for the plaintiff may sometimes find it expedient to reply by

amount to a plea of *not guilty* of the trespass; and he was therefore obliged to plead not guilty. This rule, however, might be evaded by *expressly* giving colour to the plaintiff. Thus in the case supposed, the defendant after setting forth his own title by feoffment with livery, might proceed to allege, (by a mere fiction,) that the plaintiff, claiming by colour of a prior deed of feoffment without livery, entered; upon whom, the defendant, entered; and the defendant might thus refer to the judgment of the court which of the two titles was the best. For it was held that colour thus *expressly* given cured the want of implied colour, which would otherwise have vitiated the plea. All this subtlety, however, (though curious as illustrating the close logic applied, in antient times, to the subject of pleading,) has been long set aside; for by 15 & 16 Vict. c. 76, s. 64, *colour*, (that is, express colour,) was made no longer necessary in any pleading. How far the rule itself that express colour was intended to evade, (viz., that prohibitory of a special plea amounting to the general issue,) is affected by that Act, does not distinctly appear from it; but it is obvious that such a mode of pleading would at all events often lead to unnecessary prolixity. And therefore, under the Judicature Act, 1873, it would entail expense on the party so pleading. (36 & 37 Vict. c. 66, sched. r. 18.)

(*t*) By a provision of the Common Law Procedure Act, 1854, analogous to that already noticed, sup. p. 404, n. (*p*), it was provided, that the plaintiff might reply, in answer to any plea of the defendant, facts which avoided such defence upon *equitable* grounds.

(*u*) Such statement on the part of the defendant has been hitherto called his *replication*.

way of *estoppel* (*v*);—or, in other cases, to reply by way of *new assignment;* that is, to allege that he brought his action not for the cause supposed by the defendant, but for some other cause to which the plea at present pleaded has no application; a species of reply which, like the estoppel, neither confesses nor denies the matter of the plea, its true drift being to show that the plea is irrelevant, or beside the mark. But in general, the reply is subject, (as before stated,) to the alternative of traverse, or confession and avoidance (*x*).

To the whole of this series applies the general rule, that neither party may desert or vary from the title or defence, which he has once insisted on. For this, (which is called a *departure* in pleading,) might occasion endless altercation. Therefore the reply must support the declaration without departing out of it. As in the case of a claim on a contract for money payable for goods supplied to the defendant, to which the defendant made the defence of infancy, it was held that the plaintiff could not reply that the defendant represented himself to be of full age; for such reply, by converting a claim on a contract into a complaint of fraud, would be an entire departure from his original statement (*y*).

At some stage of this series, more or less remote, it is obvious that the parties will necessarily be *brought to*

(*v*) Vide sup. p. 505.

(*x*) In the rules of pleading given by the schedule annexed to the Judicature Act, 1873, no pleadings beyond the reply are mentioned. Under the system prior to the commencement of that Act there is recognised a *rejoinder* on the part of the defendant to the replication, a *surrejoinder* from the plaintiff, a *rebutter* by the defendant, and a *surrebutter* on the part of the plaintiff. If there happen to be pleadings beyond these (a very unusual case), they have not been distinguished by any separate denominations.

(*y*) Bartlett *v.* Wells, 1 B. & Smith, 836. It is noticeable that the 15 & 16 Vict. c. 76, made no difference in respect of the effect of *departure* in pleading. A pleading liable to this defect was held bad on demurrer after that statute. (Brine *v.* Great Western Railway Company, 2 B. & Smith, 402.) It is apprehended that the rule as to this will still prevail.

issue; for as the allegation of new matter cannot be interminable, (particularly as no *departure* is allowed,) they must at length arrive, either at some exception by way of demurrer, to the sufficiency of the last pleading in point of substance,—which is an issue in law or equity; or at the denial on one side, of some matter of fact alleged on the other,—which is an issue in fact. And, in either case, the attainment of this result is (under the system at present in use) marked by the delivery, on the part of his adversary, to the party demurring or traversing, of an appropriate formula, called a *joinder in demurrer*, where the issue is in law,—and a *joinder of issue*, where the issue is in fact (*z*).

The case, however, may be such as to give rise to a new series of pleading, before the ultimate issue between the parties is attained. For it has happened that after the defendant has pleaded, nay, even after issue joined, there has arisen some new matter, affording a valid defence to the action; as that the plaintiff has since the commencement of the action given the defendant a release, and the like. Here, if the defendant takes advantage of this new matter of defence as early as he possibly can, he has been permitted to plead it, by what has been called a plea *puis darrein continuance* (*a*). For it would be unjust to exclude him from the benefit of this new defence, which it was not in his power to make when he pleaded the former (*b*). But in order to do this, he has been held to have relinquished the former defence, and to plead the new matter by way of substitution for it; to which the plaintiff

(*z*) A form for either case will be found in 15 & 16 Vict. c. 76, ss. 79, 89; and it is apprehended that some formula of the same description will be in use under the Judicature Act, 1873.

(*a*) It was so named because pleaded since the last adjournment; for the adjournments of the court were formerly called *continuances*. And by the 15 & 16 Vict. c. 76, s. 69, such a plea (which is still often spoken of under its antient appellation) must have an allegation that the matter arose after the last pleading.

(*b*) 3 Bl. Com. 316.

replies. And an issue in law, equity, or fact, is thus ultimately obtained upon the plea *puis darrein continuance*, according to the principles already explained with respect to that originally pleaded.

With a view to clearness of statement, we have hitherto supposed the plaintiff's statement to comprise only a single matter of complaint or claim, or to require only a single relief or remedy, and the plea only a single matter of defence; and the same character of unity to pervade the whole course of the pleading. But it is necessary here to remark, that the plaintiff may have occasion to bring forward several distinct matters of complaint, or several matters in respect of which he seeks some relief or remedy, and in such case he may join them together cumulatively in his statement (*c*). Hitherto, indeed, this liberty has been confined to claims in the same rights and between the same parties (*d*); but under "The Judicature Act, 1873," it is provided, that (subject to any rules of court) the plaintiff may unite in the same action and in the same statement several causes of action; but if the court or a judge shall think that any of them cannot be conveniently tried or disposed of together, separate trials may be ordered, or other order made for their being disposed of separately (*e*). So the defendant, on his side, may have

(*c*) Such cumulative statements have been called *counts*. The privilege of using them formerly led to the abuse of inserting a variety of counts, where there was in fact only *one* cause of action;—that is, of shaping a single cause of action in various modes, so that, failing to prove one count, the plaintiff might have a chance of proving another. But of late several counts on the same cause of action have not, in general, been allowed.

(*d*) By 15 & 16 Vict. c. 76, s. 41, it was provided, that causes of action, of whatever kind (with the exception of replevin and ejectment), provided they were by and against the same parties, and in the same rights, might be joined in the same action. (See Davies *v.* Davies, 1 Hurl. & C. 451.) Before that statute, not only claims in different rights or between different parties were incapable of being joined, but, generally speaking, claims in different *forms of action;* for example, there could not be a count in debt and another in trespass.

(*e*) 36 & 37 Vict. c. 66, sched. r. 22.

occasion to bring forward several distinct matters of defence, in regard to the same matter of complaint, or as to the relief or remedy required; and he has been permitted in that case, (upon first obtaining the leave of the court or a judge for the purpose,) to resort to as many different pleas (*f*). And it has been competent to him also, by the like leave, to plead and demur concurrently to the same matter. So the plaintiff has been allowed afterwards to exercise similar rights on his part;—for by the like leave he has been permitted to make several replies to the same matter of defence, or to demur and reply, concurrently, to the same matter of defence; and the same principle has been followed with respect to every subsequent step in the series of allegations (*g*). It is obvious, therefore, that the pleading will not always lead to the production of a *single* issue only, but often, (and indeed in practice most commonly,) to the production of *several*. And we may here notice that "The Judicature Act, 1873," contains a provision that where the pleadings do not, in the opinion of a judge, sufficiently disclose the issues of fact

(*f*) 15 & 16 Vict. c. 76, s. 81. A rule of court was formerly required for this purpose; but by sect. 82, a judge's order was made sufficient, and by sect. 84, certain defences of ordinary occurrence were allowed to be pleaded together, *as of course*, without either rule or order for the purpose. The pleas which might be so pleaded are the following, or any two or more of them:—a plea denying any contract or debt alleged; a plea of tender as to part; a plea of the Statute of Limitations; of set-off; of the bankruptcy of the defendant; of his discharge under an insolvent Act; of *plene administravit; of plene administravit præter;* of infancy, or coverture; of payment; of accord and satisfaction; of release; of not guilty; of a denial that the property, an injury to which is complained of, is the plaintiff's; of leave and licence; and of *son assault demesne*. In other cases, the court or judge might require from the defendant or his solicitor, as a condition for the leave, an affidavit that the pleas were respectively true in substance and in fact. No practice analogous to the above has been prescribed in the rules of pleading in the schedule annexed to the Judicature Act, 1873, but it is apprehended that the same will be still, in substance, pursued.

(*g*) See 15 & 16 Vict. c. 76, ss. 80, 81.

in dispute between the parties, he may direct them to prepare issues to be settled by himself(*h*). To return now to the progress of the action.

We have said that issues in law or in equity are to be referred to the decision of the judges of the court. This is done upon solemn argument by counsel on both sides: and to that end a *demurrer book* is made up, containing all the proceedings at length, and the demurrer is then *set down for argument;* and, on the appointed day, called on for argument(*i*). After hearing counsel on either side, the court deliver their judgment. For example, in an action of trespass, if the defendant in his plea confesses the fact, but justifies it *causâ venationis*,—for that he was hunting,—and to this the plaintiff demurs, that is, admits the truth of the plea, but denies the justification to be legal; now on arguing this demurrer, if the court be of opinion that a man may not justify trespass in hunting, they will give judgment for the plaintiff; if they think that he may, then judgment is given for the defendant. Or, again, in an action claiming a relief in equity, if the defendant shall by demurrer appeal to the judgment of court, whether on the face of the plaintiff's claim the defendant shall be bound to answer; as for want of sufficient equity therein contained, or by reason of the claim seeking a discovery of a thing which may cause a forfeiture of any kind, or may convict a man of any criminal misbehaviour and the like;—now if such demurrer is allowed, then judgment will be given for the defendant; if overruled, then for the plaintiff(*j*). And thus is an

(*h*) 36 & 37 Vict. c. 66, sched. r. 19.

(*i*) It may be here noticed, that it forms one of the rules of procedure annexed to the Judicature Act, 1873, that if it should appear to the court or a judge from the pleadings or otherwise that there is in the action some question of law which it would be convenient to have decided before any issue of fact is tried, such question may be directed to be raised for the opinion of the court, either by special case or otherwise as expedient. And all such further proceedings as the decision of the question may render unnecessary, shall be thereupon stayed. (Sched. r. 24.)

(*j*) See 3 Bl. Com. p. 446.

issue of law or of equity, on demurrer, disposed of. As to which, however, we may further remark, that the judges, in delivering their judgment, usually also make known the *reasons* for their opinion.

III. The *trial and evidence.*

If the result of the pleading be not an issue at law or in equity, but an issue or issues in fact, it then becomes necessary to determine on which side of every such issue or question the truth lies; a point that is not (as the general rule) left, like matter of law, to the court or judges, but to such other methods of decision as are appropriate by the laws of England to the particular kind of question: and this decision of fact is what is usually understood by the term *trial*,—as to which it may be remarked that in one form or other it constitutes, in every civilized country, the chief business of the courts of justice; for experience will abundantly show that above a hundred of our actions arise from disputed facts, for one whereof the law is doubted (*k*).

Under the Judicature Act, 1873, actions in the High Court of Justice established by that Act shall (at the option of the plaintiff, but if the defendant object, subject to the order of the court or judge) be tried and heard either before a judge and jury, or before a judge or judges, or before an official or special referee (*l*). And of each

(*k*) 3 Bl. Com. 330. This remark of Blackstone is still applicable. He proceeds to give the following account of the state of business in his time. "About "twenty days in the year are sufficient in Westminster Hall to set- "tle, upon solemn argument, every "demurrer or point of law that "arises throughout the nation; but "two months are annually spent in "deciding the truth of facts before "six distinct tribunals,—exclusive "of Middlesex and London, which "last afford a supply of causes "much more than equivalent to any "two of the largest circuits."

(*l*) 36 & 37 Vict. c. 66, sched, r. 30. It may be noticed here, in reference to all these modes of trial, that the judge or referees may be assisted by *assessors*, that is to say, by specially qualified persons called in to aid the court by their opinion. (See 36 & 37 Vict. c. 66, s. 56, and sched. ubi sup.)

of these methods we will give some account, commencing with the first,—the others being of recent introduction, and exceptional only in their application (*m*).

1. The first subject, then, of our inquiry will be the nature and method of the trial by *jury;* called also, in technical language, the trial *per pais*, or by the country; a trial that hath been used time out of mind in this nation, and the origin of which is so remote that it has not hitherto been satisfactorily traced (*n*).

(*m*) Blackstone (vol. iii. p. 330) mentions various other kinds of trial in civil cases in use in his time. He explains, 1. Trial *by record* to be where some matter of record (as a judgment) is alleged by one party, and the other pleads *nul tiel record*, and the point is decided by the party, alleging the existence of the record, being directed to bring it into court. 2. Trial by *inspection* or *examination* to be where, for greater expedition, the question being evidently the object of sense, is decided by the judges themselves on the testimony of their own senses. 3. Trial *by certificate* to be where the evidence of the person certifying is, by custom or otherwise, the only proper criterion of the point in dispute. 4. Trial *by witnesses* (*per testes*) to be where, as in the civil law, the judge is left to form his decision upon the credit he gives to the witnesses without the intervention of a jury. He also enumerates trial by *battle*, as to which vide post, vol. IV. p. 411; and trial by *wager of law*, as to which vide sup. p. 424.

(*n*) Blackstone (vol. iii. p. 349) considers this mode of trial as having been "universally established "among all the northern nations, "and so interwoven in their very "constitution, that the earliest ac- "counts of the one give us also "some traces of the other." He also says, that it is mentioned in England as early as in the laws of Ethelred, for which he cites Wilk. Ll. Anglo-Sax. 117. He speaks, however, of the date of its first establishment among us as unknown; and the same uncertainty is confessed in a much later work,—where, though trial by jury is considered as having been in use among the Anglo-Saxons, it is remarked, that "no "record marks the date of its com- "mencement." (Turner's Hist. Ang. Sax. vol. iii. p. 223, 6th edit.) We must add, that when the Anglo-Saxon memorials are carefully scrutinized, we find them to be such as even to justify a doubt whether trial by jury, (in any sense corresponding to our use of that term,) did actually exist among us at any time before the Norman Conquest. (See Hickes, Thes. Diss. Epist.; Hallam, Mid. Ag. vol. ii. p. 396, 7th ed.; Hist. Eng. Law, by Reeves, vol. i. pp. 24, 83.) The most probable theory seems to be, that we owe the germ of this, (as of so many other of our institutions,) to the Normans. (Vide sup. vol. I. p. 44.) At the date of Bracton's work, in the time of Henry the third, it had taken among us, (in sub-

This being the ordinary mode of trial in the English law, and at the same time one of the most important and celebrated of its institutions, we shall proceed to the dissection and examination of it in all its parts.

Here, however, it may be proper to explain, that there are different forms of this proceeding. The first is a trial *at bar;* that is, a trial before the judges of the court in which the action is brought, sitting for that purpose in *banc* (*o*). This method is comparatively rare, and has taken place only in causes of difficulty or importance; or where the Crown is concerned in interest, and insists on its right to have the cause so tried. As between private parties, it has been allowed only by special permission of the court (*p*). The second is the trial at *nisi prius;* which takes place, as formerly explained (*q*), either before a judge at the sittings for London or Middlesex (*r*), or before the judges and other commissioners of assize upon the different circuits;—and in the latter case as well as the former, it is conducted in effect before a single judge only—it not

stance,) the shape which it now wears; but its rudiments appear as early as the reign of Henry the second. Indeed, the particular species of it, called the *grand assize*, which was appropriate to the trial of the question of *mere right*, (vide sup. p. 392,) was established by a positive law of that monarch's reign. (Glanv. l. 2, c. 7.)

(*o*) Vide sup. pp. 350, 486. It forms one of the provisions of the Judicature Act, 1873, that on the commencement of that Act in November, 1874, such business as would previously have been transacted in the Queen's Bench, Common Pleas or Exchequer by the court sitting "in banc," shall be disposed of by *divisional courts* of the High Court of Justice (36 & 37 Vict. c. 66, s. 41). It is also directed, that the trial of every question or issue of fact by a jury shall be held before a single judge, unless specially ordered to be held before two or more judges (Sched. r. 33).

(*p*) See 11 Geo. 4 & 1 Will. 4, c. 70, s. 7; Dimes *v.* Lord Cottenham, 1 L., M. & P. 318.

(*q*) Vide sup. p. 349.

(*r*) Subject to rules of court, sittings for the trial by jury of causes and questions or issues of fact, shall (on the coming into operation of the Judicature Act, 1873) be held in Middlesex and London (so far as reasonably practicable, and subject to vacations), continuously throughout the year by as many judges as the business to be disposed of may render necessary (36 & 37 Vict. c. 66, s. 30).

being the usual practice for more than one judge to sit in the same cause, upon circuit. But of these methods we propose to discuss the trial at *nisi prius* only, which is the ordinary and regular one,—and shall only remark further with respect to the trial at bar that it has in general the same incidents; particularly as regards the law of evidence, which applies to both alike (*s*).

When therefore an issue in fact has been joined (*t*), and the trial thereof is intended to take place at *nisi prius*, the plaintiff's solicitor is first to *make up and deliver the issue;* that is, to draw up a transcript, on paper, of all the pleadings, and deliver it to the defendant's solicitor, that he may ascertain it to be a correct copy of the pleadings which have actually taken place: which transcript is itself called *the issue*,—its most material part being the question or issue in which the pleadings have terminated (*u*).

The next step is to *enter the proceedings on record;* which the plaintiff's solicitor does by transcribing on a parchment roll the issue so made up, and delivering the same at the proper office of the court. This roll is called the *Nisi Prius Record* (*x*).

(*s*) As to the practice on a trial at bar, see Buson *v.* Denman, 1 Exch. 769. A trial by jury in certain actions (involving demands of small amount) pending in the superior courts used also occasionally to take place before some judge of an inferior court of record or before the under-sheriff, (or in London before one of the sheriff's *secondaries*,) on a *writ of trial* directed to such judge or sheriff, under 3 & 4 Will. 4, c. 42, s. 17. And though that enactment was repealed by 30 & 31 Vict. c. 142, s. 6, its place is supplied by the provisions of the same Act enabling the defendant, in certain cases, to obtain an order that the action be tried in one of the county courts (vide sup. pp. 287, 288). Moreover, where, after judgment by default, in an action for unliquidated damages, or on judgment for the plaintiff on demurrer, the amount of damages have to be ascertained, it has been the practice to have them *assessed*, before the sheriff or other officer, by a *jury*.

(*t*) Vide sup. p. 499.

(*u*) This step in the proceedings is not mentioned in the rules of procedure annexed to the Judicature Act, 1873; but it may be presumed that the practice herein (and as to the Nisi Prius Record) will be still substantially the same.

(*x*) See 15 & 16 Vict. c. 76, s. 102.

The jury to try the issue or issues, which the *nisi prius* record comprises, is constituted as follows:—A precept is issued by the commissioners of assize (or by one of the judges, in the case of sittings in London and Middlesex), directing the sheriff to summon a sufficient number of jurors for the trial of all issues, whether civil or criminal, which shall come on for trial at the next assizes, or at the next sittings of the court, as the case may be (*z*). A printed panel, or slip of parchment containing the names of the jurors, summoned in obedience to such precept, is made out by the sheriffs, and kept open for public inspection; and a copy of it is annexed to each *nisi prius* record sent from the superior court for trial at those assizes or sittings (*a*). And this panel is to contain the names, abodes and additions of a number of jurors not less than forty-eight, nor exceeding seventy-two, taken from the *jurors' book;* which book, by the "County Juries Act, 1825" (6 Geo. IV. c. 50), is to be annually made out in each county, out of lists returned from each parish by the churchwardens and overseers, of persons therein qualified to serve as jurors (*b*).

The course above described, however, applies only in cases where the trial is intended to be by a *common* jury; that is, a jury consisting of persons who possess only the ordinary qualification in point of property, to which we shall have occasion hereafter to refer. But it is in the option either of plaintiff or defendant, in lieu

(*z*) 15 & 16 Vict. c. 76, ss. 105, 107.

(*a*) Sects. 105—107.

(*b*) 6 Geo. 4, c. 50, s. 12. It is by this statute, and by the Juries Act, 1870 (33 & 34 Vict. c. 77), that the practice relative to summoning juries, and the qualification of jurors, is mainly regulated. See also 15 & 16 Vict. c. 76, ss. 104—116; 17 & 18 Vict. c. 125, s. 59; 25 & 26 Vict. c. 107, and 34 Vict. c. 2. With regard to the expense of making out the jury lists, see 7 & 8 Vict. c. 101, s. 60. It may be noticed, that by 6 Geo. 4, c. 50, the lists were ordered to be made out by annual *precepts* issued by the high constables of the county; but by 25 & 26 Vict. c. 107, the duties of the high constables in this behalf were transferred to the *clerk of the peace.*

of this, to have the cause tried by a *special* jury; viz., a jury consisting of persons who (being on the jurors' book) are of a certain station in society; viz., esquires or persons of higher degree, or bankers or merchants, or who shall occupy a house or other premises of a certain rateable value (*c*). To provide for *country* causes to be tried by special jury, the sheriff is directed, by the same precept of the judge of assize already mentioned, to summon a sufficient number of special jurymen, to try all the special jury causes at the then approaching assizes: and a printed panel of the special jurors so summoned, is to be kept in the sheriff's office for public inspection; and a copy of it delivered out to parties, and annexed to the *nisi prius* record, in the same manner as in the case of common jurors (*d*). But with respect to London and Middlesex (or *town*) causes, the practice has been somewhat different; for where any such cause is to be tried by a special jury, due notice thereof having been given, recourse has been had, by the sheriff, to the *special jurors' list;* which is a list annually made out by him of persons qualified to act as special jurors (*e*). Tickets corresponding with the names of the jurors on this list, being put into a box and shaken, the officer takes out forty-eight (*f*); to any of which names either party may object for incapacity; and supposing the objection to be established, another name is substituted; and these forty-eight names having at a subsequent period been reduced to twenty-four, by striking off such as each party shall in his turn wish to be removed, the twenty-four are accordingly summoned, and their names are placed upon a panel,—to be kept for inspection, delivered out, and annexed to the *nisi prius*

(*c*) See 33 & 34 Vict. c. 77, s. 6. As to a "good," as distinct from a *special*, jury in London and Middlesex, in the execution of a writ of inquiry, see Vickery *v.* London, Brighton, &c. Rail. Co., Law Rep., 5 C. P. 165.

(*d*) No special jury need, however, be summoned by the sheriff, unless he has received notice to do so from a party to one or more of the causes to be tried.

(*e*) 6 Geo. 4, c. 50, s. 31.

(*f*) 15 & 16 Vict. c. 76, s. 110.

record, according to the practice in country causes (*g*). This method is commonly described as *striking* a special jury (*h*); but, by the Juries Act, 1870, it shall be resorted to only, for the future, in compliance with the order of the court or a judge. And in other cases special, instead of ordinary, jurors shall be summoned at the option of either party, in the same manner in all respects as in country causes (*i*).

We may now return to the particular action in which we have supposed issue to have been joined, and a *nisi prius* record made up and delivered.

The next step for the plaintiff to take, provided he has previously given *notice of trial*—a notice which he is entitled to give as early as the delivery of the replication (*j*),—is to *enter the cause for trial*. For this purpose, the panel of jurors already described having been annexed to the *nisi prius* record, that record is taken to the proper officer of the court, and entered with him. And as, if not so entered, the cause cannot be tried, it is therefore in the plaintiff's breast to delay any trial by not carrying down the record,—unless the defendant, being fearful of such neglect in the plaintiff, and willing to discharge himself from the action, himself undertakes to bring on the trial, giving proper notice thereof to the plaintiff, which proceeding has been called the *trial by proviso* (*k*). It has also been provided, that if, after issue joined, such issue be not brought on to be tried according to the course of the court, the defendant after due notice shall be at liberty to suggest on the record, that the

(*g*) 15 & 16 Vict. c. 76, s. 110.

(*h*) See 6 Geo. 4, c. 50, s. 32.

(*i*) 33 & 34 Vict. c. 77, ss. 16—18.

(*j*) Under the existing regulations it must (as the general rule) be a ten days' notice at least. But if the defendant be under terms to take "short notice," only four days are required. (15 & 16 Vict. c. 76, ss. 97, 217.) No mention is made of "notice of trial" in the rules of procedure annexed to the Judicature Act, 1873; but there seems no reason to suppose that the present practice herein will be changed, in any material point.

(*k*) 3 Bl. Com. 357.

plaintiff has failed to proceed to trial, though duly required to do so; and may then sign judgment for his costs (*l*).

[Let us now pause awhile, and observe with Sir Matthew Hale (*m*), in these first preparatory stages of the trial, how admirably this constitution is adapted and framed for the investigation of truth, beyond any other method of trial in the world. For, first, the person summoning the jurors is a man of some fortune and consequence; that so he may be not only the less tempted to commit wilful errors, but likewise be responsible for the faults of either himself or his officers; and he is also bound by the obligation of an oath faithfully to execute his duty. Next, as to the course of proceeding, it is, as we have seen, so managed, that the parties may have notice of the jurors, and of their sufficiency or insufficiency, characters, connexions, and relations, that so they may be challenged upon just cause. Again, the persons before whom they are to appear, and before whom the trial is to be held, are the judges or commissioners of assize appointed by the Crown; persons whose learning and dignity secure their jurisdiction from contempt, and the novelty and very parade of whose appearance have no small influence upon the multitude. The very point of their being (in the case of a country cause) strangers in the county, is also of infinite service in preventing those factions and parties which would intrude in every cause of moment, were it tried only before persons resident on the spot, as justices of peace and the like (*n*). And we may further remark, that as this constitution prevents party and faction from intermingling in the trial of right, so it keeps both the rule and the administration of the laws uniform. These judges, though thus varied and shifted at every

(*l*) 15 & 16 Vict. c. 76, s. 101.

(*m*) Hist. C. L. c. 12.

(*n*) So much consequence was formerly attached to this consideration, that it was, as we have seen, once ordained that no man of the law should be judge of assize in his own county. Vide sup. p. 351.

[assizes, are all sworn to the same laws, have had the same education, have pursued the same studies, converse and consult together, and communicate to each other their decisions and resolutions. Hence their administration of justice and conduct of trials are consonant and uniform; whereby that confusion and contrariety are avoided which would naturally arise from a variety of uncommunicating judges, or from any provincial establishment (*o*).] And we may remark that the excellence of the existing system is so universally acknowledged, that it was thought desirable to insert in the Judicature Act, 1873, an express provision that nothing therein contained nor in the schedule thereto annexed, nor in the rules of court to be made thereunder, shall affect the law as to jurymen or juries (*p*).

But let us now return to the assizes, or sittings at *nisi prius*, where, (all previous steps having been regularly settled,) we will suppose the cause to be called on in court. The nisi prius record is then handed to the judge to peruse, and observe the pleadings, and what issues the parties are to maintain and prove: while the jury is *called* and *sworn* (*q*).

The calling of the jury consists in successively drawing out of a box, into which they have been previously put, the names of the jurors on the panels annexed to the nisi prius record, and calling them over in the order in which they are so drawn (*r*); and the twelve (*s*) persons whose

(*o*) The establishment of provincial County Courts, under the superintendence of judges not in immediate communication with the judges of the superior Courts, is not to be considered as any disparagement to these remarks; but as a sacrifice made, in comparatively unimportant causes, to the great objects of economy and expedition.

(*p*) 36 & 37 Vict. c. 66, s. 72.

(*q*) Vide post, p. 529.

(*r*) 6 Geo. 4, c. 50, s. 26; 15 & 16 Vict. c. 76, ss. 108, 110; 33 & 34 Vict. c. 77, s. 16.

(*s*) In this patriarchal and apostolical number of twelve, of which a jury in the superior courts always consists, "Lord Coke has discovered," (says Blackstone, vol. iii. p. 366) "abundance of mystery." (See Co. Litt. 155.) And he proceeds to remark, that Dr. Hickes, who attributes the introduction of this number to the Normans, tells us that among the inhabitants of

names are first called, and who appear, are sworn as the jury; unless some just cause of challenge or excuse, with respect to any of them, shall be brought forward. It sometimes happens, however, that, on the application of one of the parties before the trial, an order has been obtained, directing that a *view* should be had, by certain of the jurors on the panel, of the messuages, lands or place in question: in which case, six or more of the jurors, to be agreed on by the parties, or nominated by the sheriff, shall be appointed to have the matter in question shown to them by two persons named in such rule or order; and then such of the jury as have had the view, or so many of them as appear, shall be sworn on the inquest, previous to any other jurors (*t*).

After the jurors have appeared, and before they are sworn, they are liable to be *challenged* by either party. Challenges are of two sorts—challenges to the *array*, and challenges to the *polls*.

A challenge to the array is an exception to the whole panel in which the jury are arrayed, or set in order, by

Norway, from whom the Normans as well as the Danes were descended, a great veneration was paid to the number *twelve*. "*Nihil sanctius, nihil antiquius fuit; perinde ac si in ipso hoc numero secreta quædam esset religio.*" Mr. Hallam also (Hist. Mid. Ag. vol. ii. p. 401, 7th ed.) remarks upon the veneration with which this number was regarded in Scandinavia generally, and cites Spelman's Glossary, voce *Jurata;* Du Cange, voce *Nembda;* and the Edinb. Review, vol. xxxi. p. 115; which last he characterizes as "a most learned and elaborate essay." He observes, too, that Spelman has produced several instances of the regard paid to twelve, in the early German laws; and we have seen in a former note, that there is distinct evidence that twelve jurors were in use among the Anglo-Saxons for an *inquisition*, though there seems no sufficient proof that it was used by them as the number for *trial*. Vide sup. p. 513, n. (*s*).

(*t*) 3 Bl. Com. 358. As to a *view*, see 6 Geo. 4, c. 50, s. 24; 15 & 16 Vict. c. 76, s. 114; by the last of which enactments the *writ* of view formerly required in such cases was dispensed with. By 17 & 18 Vict. c. 125, s. 58, it was also provided that either party might apply for the *inspection* by the jury, or by the party himself, or by his witnesses, of any real or personal property, the inspection whereof was material to the determination of the question in dispute.

the sheriff; and it may be made upon account of partiality or some default in the officer who arrayed the panel; as if he be a party in the suit, or related by either blood or affinity to either of the parties. Also, though there be no personal objection against the sheriff, yet if he arrays the panel at the nomination, or under the direction of either party, this is a good cause of challenge to the array (*u*).

A challenge to the array may be either by way of *principal* challenge, or a challenge *to the favour;* the former being on one of the direct grounds above described; the latter, on grounds that imply only a probability of bias or partiality, as that the son of the sheriff has married the daughter of the adverse party, or the like (*x*); and there seems to be this practical difference between them, that the first, if sustained in point of fact, must be allowed as of course; the allowance of the latter, is matter of judgment and discretion only (*y*). If the challenge be controverted by the opposite party, it is to be left to the determination of two *triors* to be appointed

(*u*) Formerly, if a lord of parliament had a cause to be tried, and no *knight* was returned upon the jury, it was a cause of challenge to the array. (Co. Litt. 156 a; Selden, Baronage, ii. 2.) But this objection is now taken away. (See 24 Geo. 2, c. 18; 6 Geo. 4, c. 50, s. 28.) Moreover, it was once necessary that some of the jury should be returned from the neighbourhood where the cause of action was laid in the declaration, so that if none were returned from the same hundred, the array might be challenged for want of *hundredors;* an objection founded on the early practice of our law, by which the jurors, in the origin of the institution of trial by jury, were summoned altogether *de vicineto,* and were indeed in the nature of *witnesses,* rather than judges. But the necessity for the hundredors was by successive statutes gradually abolished. (See 27 Eliz. c. 6; 4 Anne, c. 16; 24 Geo. 2, c. 18; 6 Geo. 4, c. 50, s. 13.) The array might also formerly be challenged if an *alien* were party to the proceedings, and if, (after that fact was established and application made to the court for the purpose,) the sheriff did not return a jury *de medietate linguæ,* that is, a jury one half of which consisted of aliens, supposing so many to be found in the place. But this trial by a jury *de medietate* was abolished in civil actions by 6 Geo. 4, c. 50, ss. 3, 47; and in other cases, by 33 Vict. c. 14, s. 5.

(*x*) Co. Litt. 156 a.

(*y*) Ibid.; and see 3 Bl. Com. 363.

by the court (*z*); and if these decide in favour of the objection, the array is to be quashed, and a new jury impanelled by the coroner (*a*); who in this, as in some other instances, acts as substitute for the sheriff, where exception is taken to the latter (*b*).

[Challenges to the polls, *in capita*, are exceptions to particular jurors, and seem to answer to the *recusatio judicis* in the civil and canon laws; by the constitution of which, a *judex* might be refused upon any suspicion of partiality (*c*). By the laws of England also, in the times of Bracton and Fleta, a judge might be refused for good cause (*d*); but now the law is otherwise, and it is held that judges and justices cannot be challenged (*e*). For the law will not suppose a possibility of bias or favour in a judge who is already sworn to administer impartial justice; and whose conduct upon the judgment seat is under the immediate check of public observation. And should the fact at any time prove flagrantly such as the delicacy of the law will not presume beforehand, there is no doubt but that such misbehaviour would draw down a heavy censure from those to whom the judge is accountable for his conduct.]

But challenges to the jurors themselves, (who are judges of fact only, and are merely private persons,) do not fall under the same principle, and are consequently allowed. They are reduced to four heads by Sir E. Coke—*propter honoris respectum; propter defectum; propter affectum;* and *propter delictum* (*f*).

(*z*) It would seem that a principal challenge may be tried by the court itself, without the intervention of triors. (See Mayor of Carmarthen *v.* Evans, 10 Mee. & W. 274.)

(*a*) Newman *v.* Edmonds, 1 Bulst. 114; 2 Hale, P. C. 275; R. *v.* Edmonds, 4 B. & Ald. 471. If any exception be taken to the coroner, the jury is to be arrayed by two persons named by the court and sworn to the discharge of their duty. These have been called *elisors* or electors, and no challenge has been allowed to their array. (3 Bl. Com. 355; Fortesc. de Laud. LL. c. 25; Co. Litt. 158.)

(*b*) Bl. Com. ubi sup.

(*c*) 3 Bl. Com. 361; Cod. 3, l. 16; Decretal. l. 2, t. 28, c. 36.

(*d*) L. 5, c. 15; L. 6, c. 37.

(*e*) Co. Litt. 294.

(*f*) Co. Litt. 156 b.

1. *Propter honoris respectum;* as if a lord of parliament be impanelled on a jury, he may be challenged by either party, or he may excuse himself as exempted by law (*g*). 2. *Propter defectum;* as if a juryman be an alien born, and neither domiciled in this country nor naturalized, this is defect of birth and ground for challenge (*h*): in connection with which we may notice the defect of sex,—no female being capable of serving on a jury (*i*). But the principal deficiency is defect of estate. The qualification in this respect of an ordinary juror formerly depended on a variety of statutes, but now on the County Juries Act, 1825 (6 Geo. IV. c. 50), alone (*k*). By this statute the general qualification of a juror is as follows (*l*):—He must be between twenty-one and sixty years of age; and must have within the county in which he resides, and in which the action is to be

(*g*) 6 Geo. 4, c. 50, s. 2. It has been doubted whether, since the peerage has been thus made matter of *exemption*, it is any longer matter of *challenge* by the parties. (See Arch. Pr. by Chitty, 8th ed., p. 424.)

(*h*) Sect. 3. But by 33 & 34 Vict. c. 77, s. 8, an alien domiciled in England or Wales for ten years is qualified and liable to serve; and as to a *naturalized* alien, see c. 14, s. 7. See as to the challenge of *alienage*, R. *v.* Sutton, 8 B. & C. 417.

(*i*) Except, of course, in the case of a jury of matrons, upon the writ *de ventre inspiciendo*. (As to this, see 6 Geo. 4, c. 50, s. 1, and 3 Bl. Com. 362.)

(*k*) It appears from Blackstone (vol. iii. p. 362), that by the statute of Westminster the second, (13 Edw. 1, c. 38,) the general qualification for juries in assizes was 20*s.* by the year; which was increased to 40*s.* by 21 Edw. 1, st. 1, and 2 Hen. 5, st. 2, c. 3. This was doubled by 27 Eliz. c. 6, which required an estate of freehold, to the yearly value of 4*l.* at the least. But the value of money greatly decreasing, the qualification was raised by a temporary Act, (16 & 17 Car. 2, c. 3,) to 20*l.* per annum, and on the expiration of that Act was afterwards fixed by 4 & 5 W. & M. c. 24, at 10*l.* per annum, and 6*l.* in Wales, of freehold land or copyhold; which was the first time that copyholders were allowed to serve on juries in the superior courts. In addition to which, it was afterwards provided, by 3 Geo. 2, c. 25, that any leaseholder, for 500 years absolute, or any term determinable on a life or lives, of the clear yearly value of 20*l.* over and above the rent, should be qualified.

(*l*) As noticed sup. p. 517, the property qualification of a *special* juror is higher, and depends on the Juries Act, 1870, (33 & 34 Vict. c. 77), s. 6.

tried, in his own name, or in trust for him, 10*l.* by the year above reprises, in lands or tenements of freehold, copyhold, or customary tenure, or of antient demesne; or in rents issuing out of such lands or tenements; or in such lands, tenements and rents taken together, in fee simple, fee tail, or for the life of himself or some other person. Or else he must have within the same county 20*l.* by the year, above reprises, in lands or tenements, held by lease for twenty-one years or longer, or for a term of years determinable on any life or lives. Or he must, at the least, be a householder, rated or assessed to the poor rate,—or to the inhabited house duty,—in Middlesex, on a value of not less than 30*l.*, or (in any other county) on a value of not less than 20*l.* (*m*). And if he does not possess one or other of these qualifications, it is a ground of challenge (*n*). 3. Jurors may be challenged *propter affectum;* for suspicion of bias or partiality. This (as in the case of a challenge to the array) may be either a *principal* challenge or *to the favour*. It is laid down as a cause of principal challenge—that a juror is of kin, to either party, within the ninth degree (*o*); that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that

(*m*) 6 Geo. 4, c. 50, s. 1. The Act adds, "or he must occupy a house containing no less than fifteen windows,"—a qualification which had reference to the *window tax*, since abolished. The above qualifications apply not only to juries impanelled to try issues, (whether out of the superior courts or out of the county courts,) but also to jurors on writs of inquiry. They do not apply, however, to the jurors in towns corporate, or counties corporate, possessing jurisdictions of their own; the panels of whose juries are to be prepared in manner before accustomed; and as to *London* jurors, the Act provides a different qualification, viz. that a juror must be a householder or the occupier of a shop, warehouse, counting-house, chambers or office, for the purpose of trade or commerce, within the city; and have lands, tenements or personal estate of the value of 100*l.* (Sect. 50.)

(*n*) Sect. 27.

(*o*) See Onions *v.* Nash, 7 Price, 263; Hewitt *v.* Ferneley, ibid. 234.

he has formerly been a juror in the same cause; or that he is the party's master, servant, counsellor, steward, or attorney, or of the same society or corporation with him. On the other hand, challenges to the favour are in respect of an objection founded on some probable circumstances of suspicion,—as acquaintance with the parties and the like (*p*). Challenges of either kind are determined, like those to the array, by *triors;* the practice being stated to be as follows. In case the first man called on the jury be challenged, the triors must be two indifferent persons named by the court; and if they try one man, and find him indifferent, he shall be sworn; and then he and the two triors shall try the next; and when another is found indifferent and sworn, the two triors shall be superseded, and the two first sworn on the jury shall try the rest (*q*). 4. Challenges *propter delictum*, are in respect of some crime or misdemeanor,—as for an attainder of treason or felony, or conviction of any infamous crime, (unless he shall have obtained a free pardon,) or for outlawry (*r*).

Besides these challenges (*s*), which are exceptions

(*p*) Finch, L. 401. It is remarkable that in the *nembda* or jury of the antient Goths, there was a distinction similar to ours, as to the nature of the challenges: "*Licebat palam excipere, et semper ex probabili causâ tres repudiari; etiam plures ex causâ prægnanti et manifestâ.*"—Stiern. l. 1, c. 4.

(*q*) Co. Litt. 158. It is said that a principal challenge to the polls may, like a principal challenge to the array, be tried by the *court*, without the intervention of triors. (Arch. Pr. by Chitty (8th edit.), p. 428.)

(*r*) See 6 Geo. 4, c. 50, s. 3; 33 & 34 Vict. c. 77, s. 10.

(*s*) It is to be observed, that the case of a formal challenge, whether to the array or to the polls, has now become infrequent; for where the sheriff is not indifferent, the jury may be impanelled in the first instance by the coroner; and supposing it to be nevertheless impanelled by the sheriff, this would (it seems) be a sufficient ground not only for challenge, but for moving in arrest of judgment after the verdict. (See Arch. Pr. by Chit. 8th edit., p. 422.) So in case of any objection to a particular juror, the usual course now is, simply to intimate the objection to the proper officer of the court; who, unless the matter be disputed on the other side, will refrain from calling him. So that the learning of challenges, in civil cases at least, (though still of importance,) is rarely illustrated by the modern practice of the courts.

against the fitness of jurors, and whereby they may be *excluded* from serving, there are also other causes to be made use of by the jurors themselves, which are matters of *exemption;* whereby their service is excused, and not excluded. These exemptions formerly depended on various statutes, customs, and charters; but now depend upon the "Juries Act, 1870," (33 & 34 Vict. c. 77,) alone. The persons exempted by that statute are as follow:—peers; members of parliament; judges; clergymen; Roman Catholic priests; ministers of any congregation of Protestant dissenters and of Jews, whose place of meeting is duly registered, and who follow no secular occupation but that of schoolmaster; serjeants, barristers, certificated conveyancers and special pleaders, actually practising; members of the Society of Doctors of Law, and advocates of the civil law, actually practising; attornies, solicitors, and proctors, actually practising and taking out their annual certificates (and their managing clerks); and notaries public, in actual practice; officers of the courts of law and equity, and of the admiralty and ecclesiastical courts, including therein the courts of probate and divorce, and the clerks of the peace and their deputies, actually exercising their duties; coroners, gaolers, and keepers of houses of correction, and their subordinate officers; keepers in public lunatic asylums; physicians, surgeons, apothecaries, and all registered medical practitioners actually practising, and pharmaceutical chemists; officers of the navy, army, militia and yeomanry, on full pay; the members of the Mersey Docks and Harbour Board; the master, wardens, and brethren of the Trinity House; pilots and masters of vessels in the buoy or light service, duly licensed; servants of the royal household; officers of the post office, customs and inland revenue; sheriff's officers; officers of the rural and metropolitan police; the metropolitan police magistrates and their subordinate officers; members of the council and justices, and town clerks and treasurers of municipal boroughs (so far

as regards juries for the county in which the borough is situate); burgesses for boroughs with a separate quarter sessions (so far as above); a justice of the peace (so far as any sessions are concerned within the jurisdiction of which he is a justice) and officers of the Houses of Lords and Commons (*t*).

If a sufficient number of jurors do not appear, or if by means of challenges or exemptions a sufficient number of unexceptionable ones do not remain, either party may pray a *tales*. A tales is a supply of *such* men as are summoned upon the panel, in order to make up the deficiency. For this purpose a writ of *decem tales*, *octo tales*, and the like, used, at common law, to issue to the sheriff (*u*). But the judge, trying the cause, was empowered, by the 6 Geo. IV. c. 50, s. 37, at the request of either party, to award a tales *de circumstantibus* (*x*); that is, to command the sheriff to return so many other men duly qualified as shall be present, or can be found, to make up the number required for making up a full jury; and to add their names to the former panel. But in the case of common jurors,—of whom seventy-two are usually returned on the same common jury panel (*y*), —it happens of course but rarely, that the whole are exhausted so as to make a tales necessary; and in special jury causes, the deficiency is, by the same statute, directed to be made up from the common jury panel, if a sufficient number can be found. But if such number be not found, there is then to be a tales *de circumstantibus*, in manner before directed (*z*).

The necessary number of twelve qualified persons being

(*t*) 33 & 34 Vict. c. 77, s. 9, et Sched.

(*u*) 3 Bl. Com. 365.

(*x*) F. N. B. 166; Reg. Brev. 179.

(*y*) Vide sup. p. 516.

(*z*) 6 Geo. 4, c. 50, s. 37. As to a tales in a special jury cause, see Gatliff *v.* Bourne, 2 M. & Rob. 100; Snook *v.* Southwood, 1 R. & M. 429; British Museum *v.* White, 3 Car. & P. 289. It was provided by 15 & 16 Vict. c. 76, s. 113, that where notice has not been given that a cause is to be tried by special jury, it may be tried by a jury from he panel of common jurors.

at length obtained, they are then separately sworn upon the New Testament (*a*), "well and truly to try the issue between the parties, and a true verdict to give according to the evidence;" and hence they are denominated the "jury," *jurati*, and the "jurors" *juratores* (*b*).

[The jury are now ready to hear the merits; and to fix their attention the closer to the facts which they are impanelled and sworn to try, *the pleadings are opened* to them on the part of the plaintiff; and, (as a general rule,) the case is then stated by counsel on that side which holds the affirmative of the question in issue (*c*). For the issue is said to lie, and proof is always first required, upon that side which affirms the matter in question (*d*); in which our law agrees with the civil: "*ei incumbit probatio, qui dicit, non qui negat; cum per rerum naturam factum negantis probatio nulla sit*" (*e*).] The opening

(*a*) This applies only to persons professing the Christian religion, and not proposing to be sworn in a different manner, as they may claim to be, if they please, under 1 & 2 Vict. c. 105. And if the juror summoned refuse or be unwilling from alleged conscientious motives to be *sworn* at all, he may now (by 30 & 31 Vict. c. 35, s. 8) make solemn affirmation instead.

(*b*) Blackstone remarks (vol. iii. p. 366), that the *selecti judices* of the Romans bore in many respects a remarkable resemblance to our juries,—"for they were first re-"turned by the prætor; then their "names were drawn by lot, till a "certain number was completed; "then the parties were allowed "their challenges; next they struck, "what we call a tales; lastly, like "our jury, they were sworn." (See Ascon. in Cic. Verr. 1, 6.) He also remarks, that a learned writer of our own, Dr. Pettingall, hath shown, in an elaborate work (published A.D. 1769), so many resemblances between the διαιτηται of the Greeks, the *judices selecti* of the Romans, and the juries of the English, that he is tempted to conclude that the latter are derived from the former. As to the derivation of our juries, however, vide sup. p. 513, n. (*n*).

(*c*) In all actions for *unliquidated damages*, the plaintiff, however, shall begin, though the affirmative of the issue is on the defendant. (See Mercer *v.* Whall, 5 Q. B. 447; Cooper *v.* Wakley, Moo. & M. 248.)

(*d*) Calder *v.* Rutherford, 3 Brod. & Bing. 302; Evans *v.* Birch, 3 Camp. 10.

(*e*) Ff. 22, 3, 2; Cod. 4, 19, 23. But there are cases in which the law presumes the affirmative; and where consequently the party asserting the negative must prove his case. (See Williams *v.* East India Company, 3 East, 192.)

counsel briefly informs them what has been transacted in the action, up to that stage of its prosecution; explains the parties, the nature of the action, the statement of the plaintiff, and the other pleadings and proceedings; and, lastly, upon what point the issue is joined, which is there sent down to be determined (*f*). The nature of the case itself, and the evidence intended to be produced, are next laid before the jury; and then the evidence itself is produced; and when it has been gone through (and in some cases summed up also), the advocate on the other side opens the adverse case, and supports it, if its nature so require, by evidence; which he is also entitled to sum up; and then the party which began is heard by way of reply. But no reply is allowed, (save only in the case of the Crown,) unless evidence has been given in answer to the case first stated (*g*).

The nature of the present work is not adapted to a disquisition on the numberless niceties and distinctions which attend the law of evidence. We must confine ourselves to a few observations on its general nature, and a notice of some of its leading rules and maxims (*h*).

(*f*) Blackstone remarks (vol. iii. p. 367), that "instead of this, formerly, the whole record and process of the Latin pleadings were read to the jury in English by the court, and the matter in issue clearly explained to their capacities."

(*g*) By 17 & 18 Vict. c. 125, s. 18, it was provided, that the party who begins, or his counsel, shall be allowed (in the event of his opponent not announcing at the close of the opening case his intention to adduce evidence) to address the jury a second time at the close of such case, for the purpose of summing up the evidence he has adduced; and the party on the other side, or his counsel, shall be allowed to open his case, and also to sum up his evidence (if any). This provision makes no difference as to the right *to reply*, which remains as mentioned in the text.

(*h*) It forms one of the provisions of the Judicature Act, 1873, that, except in reference to the power of the court for special reasons to allow depositions or affidavits to be read, nothing in the Act or in the schedule annexed thereto, or in the rules to be made in virtue thereof, shall affect the mode of giving evidence by oral examination of witnesses in trials by jury or the rules of evidence. (36 & 37 Vict. c. 66, s. 72.)

Proofs or evidence, (for the terms are generally used as synonymous,) are either *written* or *parol*. The former consists of records, deeds or other writings (*i*); the latter of witnesses personally appearing in court, and (as the general rule) sworn to the truth of what they depose.

With respect to witnesses, there is a process to bring them in by writ of *subpœna ad testificandum* (*k*); which commands them, laying aside all excuses, and on pain of forfeiting 100*l*., to appear at the trial, and give their evidence. And such writ may contain a clause of *duces tecum*; requiring them to bring, at the same time, all such deeds or writings in their possession or power, as the party who issues the subpœna may think material for his purpose. In the event of the non-attendance of a person so subpœnaed, and his inability to show any lawful ground of excuse, (such as that of dangerous illness,) he is considered as having committed a contempt of court; and is liable to an attachment, (a species of criminal process,) under which he may be punished for such contempt. And an action will also lie against him, at suit of the party damnified by his absence, to recover compensation for any loss that may be occasioned by the non-attendance (*l*). But no witness is bound to appear at all unless his reasonable expenses for the whole period of his attendance,

(*i*) As to the admissibility in evidence of letters of an agent, Jones *v.* Shears, 4 A. & E. 832; of entries in parish books, Taylor *v.* Devey, 7 A. & E. 409; of an antient survey of a manor, ibid. 617; of books of treasurer of charity, Doe *v.* Hawkins, 2 Q. B. 212; of judgments, Christy *v.* Tancred, 9 Mee. & W. 438; of public books not judicial, Jewison *v.* Dyson, ibid. 540; Rowe *v.* Brenton, 8 B. & C. 743; of title deeds, Wollaston *v.* Hakewill, 3 Man. & Gr. 297.

(*k*) By 17 & 18 Vict. c. 34, a *subpœna* may be had to compel the attendance of witnesses at the trial of an action in the superior court, *from any part of the united kingdom*. As to the application of this statute, see O'Flanagan *v.* Geoghegan, 16 C. B. (N. S.) 636.

(*l*) As to this action, see Davis *v.* Lovell, 1 Horn & Hurl. 451; Conling *v.* Coxe, 6 D. & L. 399. As to attachment for non-attendance, see Scholes *v.* Hilton, 10 Mee. & W. 15; Chapman *v.* Davis, 1 Dowl. N. S. 239.

eundo, morando, et redeundo, are tendered him: nor if he appears, is he bound to give evidence till such charges are actually paid him; and he is also protected during the same period from any arrest for debt (*m*). If it be ascertained beforehand (*n*) that a person required as a witness will be unable to attend the trial from permanent sickness or infirmity, or absence in parts beyond its jurisdiction, the court was empowered, by 1 Will. IV. c. 22, to issue a commission for his examination at any place *out* of the jurisdiction, or to order his examination at any place *within* the jurisdiction (as the case might require) (*o*): and it was provided that such examination, (which might be on interrogatories or otherwise, as the court should direct,) might afterwards, under certain circumstances, be read in evidence at the trial. The circumstances which justify its being read under the authority of this Act are the death of the witness since his deposition was taken, or his continued sickness, infirmity or absence in parts beyond the jurisdiction of the court (*p*):—but otherwise it cannot in general be used without the consent of the party against whom it is offered (*q*). But it is to be noticed that the Rules of

(*m*) See Meekins *v.* Smith, 1 H. Bl. 636, where it was laid down that the same privilege of exemption from arrest applies to *all* persons, (whether witnesses or not,) who have *bonâ fide* occasion to attend the trial. It may be noticed that occasion for the claim of such privilege might still arise (though arrest for debt is not now generally allowed) in a case coming within the exceptions specified in the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 4.

(*n*) As the general rule, the court will not entertain an application of this nature, till after issue has been joined. (See Mondel *v.* Steele, 8 Mee. & W. 300; Finney *v.* Beasley, 17 Q. B. 86.)

(*o*) If the place where the examination is to be had is in any of the colonies or foreign dominions of the Crown, the commission is addressed to a court or judge there. The manner in which the examination is to be had by such court or judge is regulated, in certain cases, by 22 Vict. c. 20. (As to this Act, see Campbell *v.* Att.-Gen., Law Rep., 2 Ch. App. 571.)

(*p*) As to the discretion of the judge under this provision, see Duke of Beaufort *v.* Crawshay, Law Rep., 1 C. P. 699.

(*q*) 1 Will. 4, c. 22, s. 10. We may take occasion to remark here,

Procedure annexed to the Judicature Act, 1873, contain a provision that though, in the absence of an agreement between the parties and subject to rules of court applicable to any particular class of cases, the witnesses at the trial of any cause or at any assessment of damages shall be examined *vivâ voce* and in open court, any particular fact or facts may for sufficient reason be ordered to be proved by affidavit and read at the trial on such conditions as may be reasonable; or that any witness whose attendance in court ought, for any sufficient cause, to be dispensed with, shall be examined by interrogatories or otherwise before a commissioner or examiner,—unless the court or judge shall be satisfied that the other party *bonâ fide* desires the witness to be produced in court for the purpose of cross-examining him, and also that he can be produced (*r*).

All witnesses, that have the use of their reason, are to be received and examined (*s*). To this, indeed, there were formerly a variety of exceptions. For no party to the action was allowed, in any case, to give evidence; and persons *interested* in the testimony they were to give, —however slight that interest might be (*t*),—were also incompetent to be heard as witnesses on the side of the question to which their interest inclined (*u*). Moreover, persons that were *infamous*, that is, of such character

that, by 19 & 20 Vict. c. 113, it was provided that an order might issue for the examination of witnesses in England, whose testimony is required in some *foreign* court, before which any civil or commercial matter was pending; and also that a somewhat analogous proceeding (under 22 & 23 Vict. c. 62) may take place to ascertain the *law* in any part of her majesty's dominions.

(*r*) 36 & 37 Vict. c. 66, Sched., r. 36.

(*s*) A child too young to understand the nature of an oath, or an adult unable, from mental infirmity, to understand it, is necessarily incompetent. (1 Stark. Ev. 81.)

(*t*) See Doe *v.* Bramwell, 3 Q. B. 307.

(*u*) A few exceptions had been from time to time introduced by statute, to meet particular cases: see 11 Ann. st. 1, c. 18, s. 13; 13 Geo. 3, c. 78, s. 77; 9 Geo. 4, cc. 32, 33.

that they might be challenged as jurors *propter delictum* (*x*), were wholly inadmissible as witnesses. But the principle of absolute exclusion in these cases, though once among the most settled peculiarities of the English law, has been eradicated from it by modern acts of parliament; and the objection is now admissible only as affecting the *credibility*, and not the *competency* of the witness. This alteration was effected gradually. For it was, in the first place, provided, generally, by 6 & 7 Vict. c. 85, that no person offered as a witness should thereafter be excluded, on the ground of incapacity from interest or from crime, from giving evidence on any issue or inquiry whatever (*y*). Afterwards, it was further enacted by 14 & 15 Vict. c. 99, that even the *parties* themselves should, as the general rule, be both competent and compellable to give evidence, though they are not required to answer any question tending to criminate themselves. Again, by "The Evidence Amendment Act, 1853" (16 & 17 Vict. c. 83), the wife (or husband) of any party is placed, in this respect, in the same position as the party himself, subject only to the qualification following—that a husband and wife cannot give evidence for or against each other in any *criminal* proceedings, and that neither can be compelled to disclose any matters which they have learned by communication from each other during their marriage. And, finally, by "The Evidence Further Amendment Act, 1869" (32 & 33 Vict. c. 68), the parties to any action for *breach of promise of marriage*, or to any proceeding *instituted in consequence of adultery* (which were both excepted from the operation of the previous Acts), are made competent to give evidence therein (*z*). There is,

(*x*) 3 Bl. Com. 370. As to this cause of challenge, vide sup. p. 526.

(*y*) See Udal *v.* Walton, 14 Mee. & W. 254; Att.-Gen. *v.* Hitchcock, 1 Exch. 91.

(*z*) It should be noticed that, under this Act, there must be corroborative evidence of the promise; and that in case of a proceeding for adultery, no witness can be examined as to his or her having committed adultery, unless in the way of contradiction to his or her own evidence on that point. As to the effect of

however, still in force one exception to the general rule: viz., that no one shall be *sworn* who professes not to believe in the existence of a God by whom perjury will be punished (*a*). But the same Evidence Amendment Act of 1869 contains a provision that if any person called to give evidence in any court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding judge is satisfied that the taking of an oath would have no *binding effect on his conscience*, make a solemn promise and declaration that his evidence shall be true; and if he shall, nevertheless, give false evidence, he may be convicted for perjury as if he had been sworn (*b*).

The oath, (which is to speak "the truth, the whole truth, and nothing but the truth,") is administered to witnesses in general upon the New Testament; but to the believers in other religions than the Christian, in the forms appropriate to their creed (*a*). And by 1 & 2 Vict. c. 105, it is declared and enacted, that in all cases in which an oath is administered to any person on any occasion whatever, he shall be bound thereby, provided it be administered in such form and with such ceremonies as he may declare to be binding. And by 17 & 18 Vict. c. 125, s. 20, if any person called as a witness shall be unwilling from alleged conscientious motives to be sworn, the court, upon being satisfied of the sincerity of the objection, shall permit him to substitute his solemn affirmation (*c*). But both the enactments last mentioned are

32 & 33 Vict. c. 68, see In re Ridout's Trusts, Law Rep., 10 Eq. Ca. 41; Bishop of Norwich *v.* Pearse, ib., 2 Ad. & Eccl. Cas. 281.

(*a*) See Omichund *v.* Barker, 1 Atk. 49; Maden *v.* Catanach, 7 H. & N. 360. If incompetency on this ground be suspected, the practice has been to examine the witness on the *voir dire* (as it is termed), *dicere veritatem*, in order to ascertain his competency before he is sworn. (See The Queen *v.* Whitehead, Law Rep., 1 C. C. R. 33.)

(*b*) 32 & 33 Vict. c. 68, s. 4; and see 33 & 34 Vict. c. 49; and 33 & 34 Vict. c. 83.

(*c*) This provision applies only to

subject to the proviso that, upon a false statement of fact, the witness may be convicted of perjury, as though he had been sworn to it, in the form and with the ceremonies commonly adopted.

A witness is not bound to answer any question that tends to expose him to punishment as a criminal or to penal liability (*c*), or to forfeiture of any kind (*d*). But by 46 Geo. III. c. 37, it is declared and enacted, that he cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to expose him to any penalty or forfeiture on the sole ground, that the answering of such question may establish or tend to establish that he *owes a debt*, or is otherwise subject to a *civil* action. So, also, upon the general principle of the convenience of public justice, no questions are permitted to be asked, which tend to the discovery of the channels through which information has been given to the officers of justice in criminal prosecutions (*e*).

A counsel, attorney, or solicitor, is not bound or even at liberty to divulge the secrets of the cause with which he may have become confidentially intrusted (*f*); nor can

civil courts, but a similar one was afterwards passed (24 & 25 Vict. c. 66) in reference to *criminal* proceedings. Vide post, vol. IV. p. 426, n. (*f*). It is to be observed, also, that an *affirmation* is allowed in lieu of oath, on *all* occasions, in the case of Quakers, Moravians and Separatists. See 3 & 4 Will. 4, c. 49, s. 82; 1 & 2 Vict. c. 77; 6 & 7 Vict. c. 85, s. 2; 22 Vict. c. 10.

(*c*) See Stark. Ev. 136; 14 & 15 Vict. c. 99, s. 3; Bradlaugh *v.* Edwards, 11 C. B (N. S.) 377. As to the effect of a *pardon* on this privilege of a witness, see per Crompton, J., in the Queen *v.* Boyes, 1 B. & Smith, 324.

(*d*) Phill. on Evidence, vol. 2, p. 420. See Boyle *v.* Wiseman, 10 Exch. 647; Fisher *v.* Ronalds, 12 C. B. 762.

(*e*) Hardy's case, 44 St. Tr. 816; Attorney-General *v.* Briant, 15 Mee. & W. 169.

(*f*) See Reg. *v.* Duchess of Kingston, 11 St. Tr. 246; Wilson *v.* Rastall, 4 T. R. 753; Cromack *v.* Heathcote, 2 Brod. & Bing. 4; Bramwell *v.* Lucas, 2 B. & C. 745; Griffith *v.* Davies, 5 B. & Ad. 502; Marston *v.* Downes, 1 A. & E. 31; Doe *v.* Seaton, 2 A. & E. 171; Turquand *v.* Knight, 2 Mee. & W. 98; Doe *v.* Watkins, 3 Bing. N. C. 421; Weeks *v.* Argent, 16 Mee. & W. 817; Volant *v.* Soyer, 22 L. J., C. P. 83; Brown *v.* Foster, 3 Jur. (N. S.) 245,

official persons be called upon to disclose any matter of state, the publication of which may be prejudicial to the community (*g*). But the law recognizes no other privilege in this matter; and compels (for example) all professional persons, whether physicians, surgeons, or divines, to divulge any secrets (if relevant to the issue) with which they have become professionally acquainted: and will not allow even a servant or private friend to withhold a relevant fact, though of the most delicate nature, and communicated to him in the strictest confidence (*h*).

A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character; but he may, in case his witness, in the opinion of the judge, prove adverse, contradict him by other evidence; or, by leave of the judge, he may prove that he has made, at some other time, a statement inconsistent with his present testimony. In order, however, to protect the witness in such case against unfair surprise, it is necessary, before such proof be given, that the circumstances of the supposed former statement, so far as is sufficient to designate the particular occasion, should be mentioned to him; and that he should be asked whether or not he has made such statement (*i*).

One witness, if credible, is *sufficient* evidence to a jury of any single fact; though undoubtedly the concurrence of two or more corroborates the proof. For our law considers that there are many transactions to which only one person is privy, and therefore does not always demand the testimony of two, as the civil law universally requires. "*Unius responsio testis omnino non audiatur*" (*k*).

Exch. As to the case of a *trustee*, see Davies *v.* Waters, 9 M. & W. 608.

(*g*) See Beatson *v.* Skene, 5 H. & N. 832.

(*h*) See Wilson *v.* Rastall, 4 T. R. 753; Rex *v.* Duchess of Kingston, 11 St. T. R. 246; Valliant *v.* Dodemead, 2 Atk. 524.

(*i*) 17 & 18 Vict. c. 125, s. 22. See Greenhough *v.* Eccles, 5 C. B. (N. S.) 786. There is a similar enactment with regard to *criminal* trials (28 & 29 Vict. c. 18, s. 3).

(*k*) Cod. 4, 20, 9. Blackstone remarks here (vol. iii. p. 370) upon

After the examination of the witness by the party for whom he is called, which is termed his *examination in chief*, he is subject to *cross-examination* by the opposite party,—which being concluded, he may then be *re-examined* by the party calling him, in reference to any matter suggested by the cross-examination (*l*). The evidence he has given thus passes through a close and severe scrutiny; while, on the other hand, it receives all the support and protection which the interests of justice require.

The object of the cross-examination, it should be observed, may not only be to obtain new facts not before elicited, but to impeach the credit of the witness. He may therefore be asked if he has not given a contrary account of the same matter on a former occasion, and if he does not distinctly admit this, proof may then be given, *aliunde*, that he has done so (*m*). But the law, in this case, also, makes the same provision for his protection as in the case where he is interrogated as to former statements, by the party producing him (*n*); and makes besides this further proviso, that if it is intended to contradict him by his former statement in *writing*, his attention must, before the contradictory proof be given,

the qualification with which this rule is followed by our modern civilians. "As they do not allow a less "number than two witnesses to be "*plena probatio*, they call the testi- "mony of one, though never so "clear and positive, *semiplena pro-* "*batio* only, on which no sentence "can be founded. To make up "therefore the necessary comple- "ment of witnesses, when they have "one only to a single fact, they ad- "mit the party himself (plaintiff or "defendant) to be examined in his "own behalf, and administer to him "what is called the *suppletory* "oath,—and if his evidence hap- "pens to be in his own favour, this "immediately converts the half "proof into a whole one." Our law has always taken and still takes a very different course. It allows one witness to suffice as stated in the text; and as to the evidence of the parties to the suit used formerly to reject it altogether; though they are now both competent and compellable to be examined. (Vide sup. p. 534.)

(*l*) As to the practice on cross-examination and re-examination, see Prince *v.* Samo, 7 A. & E. 627.

(*m*) 17 & 18 Vict. c. 125, s. 23.

(*n*) Vide sup. p. 537.

be called to those parts of the writing which are to be used for the purpose of contradiction (*o*). Evidence may also be offered to prove that he has been convicted of perjury or the like; or, generally, that he is of such a character as not to deserve to be believed upon his oath. But no evidence can be given against him of particular acts of misconduct, for this would be to engraft another trial upon that which is already before the jury; and not only perplex the administration of justice, but put the witness himself to the unfair disadvantage of being assailed on charges of which he had no previous notice (*p*). He may, however, be questioned as to whether he has been convicted of any felony or misdemeanor; and if he denies the fact or refuses to answer, the conviction may be proved (*q*). Moreover, the credit of a witness may be impeached not only by means of cross-examination, by proving previous contradictory statements, and by evidence reflecting on his character for veracity; but also by *rebutting* his evidence by calling witnesses to disprove such of the facts stated by him, whether in his direct or cross-examination as are material to the issue (*r*).

The nature of the evidence itself, whether obtained from witnesses, or from written instruments, is the next point that naturally presents itself for consideration; and the main principles of the law connected with this subject shall here be briefly stated.

First, then, we may remark, that no evidence is necessary, as to any matters of which the court will take judicial

(*o*) 17 & 18 Vict. c. 125, s. 24; 28 & 29 Vict. c. 18, ss. 4, 5.

(*p*) 1 Stark. Ev. 145. See Queen's case, 2 Brod. & Bing. 299; Spencely *v.* De Willot, 7 East, 108; Carpenter *v.* Wall, 11 A. & E. 803.

(*q*) 17 & 18 Vict. c. 125, s. 25. By the same section a certificate containing the substance and effect only of the indictment and conviction, purporting to be signed by the clerk of the court or other proper officer, shall, upon proof of the identity of the person, be sufficient evidence of the conviction without proof of the signature or official character of the person appearing to have signed. (See also 34 & 35 Vict. c. 112, s. 18.)

(*r*) Taylor on Evidence, s. 1329.

notice; as, for instance, of the existence of a war in which the country is engaged, and which has been publicly proclaimed, or recognized in acts of parliament (*s*). Nor is any needed as to matters which the law presumes,—as that a man is innocent till the contrary be shown,—that all official acts have been done in due form;—or that a child born to a woman during her marriage with her husband is legitimate (*t*). Nor is evidence in general necessary, with respect to matters which the opposite party has at any time admitted to be true (*u*): and it is of course always dispensed with as to matters upon which an admission has been made for the express purpose of being used at the trial. And in reference to this subject we may remark, that by the 15 & 16 Vict. c. 76, s. 117, (and also under the Judicature Act, 1873,) either party may call on the other to admit, for the purpose of the trial, any document, saving all just exceptions; and in case of refusal or neglect to admit, the costs of proving the document shall be paid by the party so called upon, whatever may be the result of the action,—unless, indeed, the court shall certify that the refusal to admit was reasonable; and, on the other hand, no costs of proving any document will, in general, be allowed to a party who neglects to give such notice to his adversary (*x*). More-

(*s*) See R. *v.* Beranger, 3 M. & S. 67; Russell *v.* Dickson, 6 Bing. 442; Alcinous *v.* Nigreu, 4 Ell. & Bl. 217. As to the admission, without proof, of acts of state, judicial proceedings, and the like, and of certain official documents, purporting to be genuine, see 8 & 9 Vict. c. 113; 14 & 15 Vict. c. 99, ss. 7—14; c. 100, s. 22.

(*t*) 1 Bl. Com. 457. See Goodright *v.* Saul, 4 T. R. 251, 356; R. *v.* Mansfield, 1 Q. B. 449; Say & Sele Peerage, 1 H. of L. Cases, 509; Hargrave *v.* Hargrave, 9 Beav. 552.

(*u*) See Rex *v.* Gardner, 2 Camp. 513; Rex *v.* Topham, 4 T. R. 126; Brickett *v.* Hulse, 7 Ad. & E. 454. As to the effect of admissions implied *upon the pleadings*, by omitting to traverse a fact alleged or otherwise, see Digby *v.* Thompson, 4 B. & Ad. 821; Stracey *v.* Blake, 1 Mee. & W. 168; Bennison *v.* Davison, 3 Mee. & W. 179; Smith *v.* Martin, 9 Mee. & W. 304; Spencer *v.* Barough, ibid. 425; Bingham *v.* Stanley, 2 Q. B. 117; Gould *v.* Oliver, 2 Man. & G. 208.

(*x*) See 36 & 37 Vict. c. 66, in Sched., r. 39.

over (under the latter Act), either party may give a written notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce the same for his inspection and perusal, and to permit a copy to be taken on pain of not being allowed at the trial to put such document in evidence, unless he shall satisfy the court that it relates only to his own title (he being defendant), or that it was not produced for some other sufficient reason (*y*). Again, if it be thought desirable by either party, with a view to his case at the trial, he may (under the same Act) exhibit interrogatories to and obtain discovery from his adversary of any matters which are relevant to some issue in the cause; or to apply for an order for the production of any document in the possession or power of any other party,—such document to be dealt with by the court when produced as shall appear just (*z*).

Again, it is a fundamental rule, that no evidence is admissible except upon the point in issue (*a*). Therefore, in an action of debt, where the defendant denies his bond, by the plea that it is not his deed, and the issue is whether it be his deed or no,—he cannot give a release of this bond in evidence; for that does not destroy the bond, but shows only that it is discharged; and therefore does not support his side of the issue, which is the allegation that the bond alleged against him is not his deed. Instead of such a plea, he should have pleaded the release.

Another rule of the same general nature is, that none but the best evidence shall be adduced (*b*); by which we are to understand, that that which is of a secondary, shall not be substituted for that which is of a primary kind,

(*y*) 36 & 37 Vict. c. 66, Sched., r. 26.

(*z*) Sched., rr. 25, 26, 27. See previous provisions on this subject contained in 17 & 18 Vict. c. 125, ss. 50, 51.

(*a*) 3 Bl. Com. 367; B. N. P. 298; Hey *v.* Moorhouse, 6 Bing. N. C. 52.

(*b*) 3 Bl. Com. 368. See Taylor on Evidence, p. 340—368, 2nd edit.

where the primary evidence is accessible; a rule founded on the presumption that such a substitution is probably prompted by some sinister motive. Thus it is inflexibly held, that the contents of no *private* deed or writing,—as distinguished from a record or other public document (*c*),—can be proved by a copy (still less by mere oral evidence), if the writing be in existence, and can be procured by the party by whom the proof is offered,—but the writing itself must be produced (*d*). And if there be occasion to prove its execution by a witness,—a proof that the law in general requires, unless it be thirty years old, and come out of the possession of some person naturally entitled to the custody (*e*),—this could only be done, as the law until recently stood, by calling the particular person (if any) whose name was thereon written as attesting the execution (*f*); or by calling one of them at least, if there were several; or else by proving that such attesting witnesses are all dead or otherwise incapable of giving their testimony (*g*), and then adducing secondary evidence of the execution, as by proof of the handwriting to one or more of their signatures (*h*). And so strict was this rule in its nature, that even the admission of the party against whom the instrument was produced, that it was executed by him, (unless such admission were made for the express purpose of the trial,) would not suffice to excuse the absence of the attesting witness (*i*). But the law in this

(*c*) See 14 & 15 Vict. c. 99, s. 7.

(*d*) See M'Gahey *v.* Alston, 2 Mee. & W. 206; Jones *v.* Tarleton, 9 Mee. & W. 675; Howard *v.* Smith, 8 Man. & Gr. 254; Queen *v.* Llanfaethly, 2 Ell. & Bl. 940. We may remark here, that by 17 & 18 Vict. c. 125, s. 87, the court or a judge may order, in an action on a bill of exchange or other negotiable instrument, that the loss of it shall not be set up at the trial, provided a satisfactory indemnity is given against the claims of any other person.

(*e*) B. N. P. 255; 2 Phill. on Ev. 203; Doe *d.* Neale *v.* Samples, 8 A. & E. 151.

(*f*) Gillott *v.* Abbott, 7 A. & E. 783.

(*g*) Adams *v.* Kerr, 1 B. & P. 360.

(*h*) See Nelson *v.* Whittall, 1 B. & Ald. 19.

(*i*) Abbott *v.* Plumbe, 1 Doug. 216; R. *v.* Harringworth, 4 M. & S. 354.

respect has undergone an important change: for by 17 & 18 Vict. c. 125, s. 26, it is not now necessary to prove by the *attesting witness* any instrument to the validity of which attestation is not requisite; and such instrument may be proved, by admission or otherwise, as if there had been no attesting witness thereto (*k*).

On the other hand, however, it is held that there are no degrees in secondary evidence; but that where the circumstances are such as to excuse a party from giving the proper or primary proof, he is at liberty to resort to any species of secondary evidence within his power (*l*). Thus, where the defendant is let into secondary evidence of the contents of a letter,—by his showing that the letter itself is in the possession of the plaintiff, who has had notice to produce it in court, but fails to do so (*m*),—he is then at liberty to give *oral* evidence of its contents; and is not bound to produce a *copy*, though in fact he should have kept one (*n*).

Another principal rule is, that *hearsay*, that is, a statement by a witness of what has been said or declared out of court, by a person not party to the suit, is not admissible as evidence. For our law deems it unsafe to rely upon the assertions of any one, unless he be called as a witness in the cause, and deliver his testimony under the sanction of an oath, and the check which the power of cross-examination imposes (*o*). And this rule is so absolute, that the death of the person by whom the fact was so asserted out of court, and the consequent impossibility of producing him as a witness, makes no difference. Upon the same principle no written entry or memorandum, made by a person not party to the suit, can in general be

(*k*) And see 28 & 29 Vict. c. 18, s. 7, establishing a similar practice in *criminal* trials.

(*l*) Doe *v.* Ross, 7 Mee. & W. 192.

(*m*) As to a *notice to produce* and the manner of proving it, see 15 & 16 Vict. c. 76, s. 119.

(*n*) Brown *v.* Woodman, 6 Car. & P. 206, per Parke.

(*o*) See Wright *v.* Doe, 7 A. & E. 384; Stobart *v.* Dryden, 1 Mee. & W. 615.

admitted as evidence, even after his death, as between the plaintiff and defendant; for this falls under the same consideration, and is in effect not distinguishable from hearsay evidence.

The rejection of hearsay is subject, however, to exception in particular cases. For, first, the declaration of a third person is, in certain instances, admitted as forming part of the *res gestæ;* or, else, as deriving particular credibility from the circumstances under which it was made. Thus, if a question arises, whether a third person committed an act of bankruptcy, by absenting himself from his house, his own declaration made at the time, that he absented himself to avoid a creditor, is good evidence (*z*). So the books of stewards, or other receivers, though strangers to the suit, are admitted in evidence after their death, so far as the entries therein tend to charge them with the receipt of money; because such acknowledgments, having been made against their own interest, are entitled on that ground to particular weight (*a*). Again, declarations or statements in the nature of hearsay are admitted, where evidence of that description happens to constitute the natural and appropriate means of proof; as upon questions of pedigree, custom, boundary, and the like (*b*). To which we add, as another exception from the general rule, that a statement made by a third person will be receivable as evidence against the plaintiff or defendant in the cause, if the plaintiff or defendant be proved to have been present when the statement was made, and to have heard its import; for it then becomes material to consider whether, by his language or de-

(*z*) 1 Stark. Ev. 48.

(*a*) See Higham *v.* Ridgeway, 10 East, 109; Doe *v.* Coulthred, 7 A. & E. 235; Percival *v.* Nanson, 7 Exch. 1. As to entries against interest, see 2 Smith's Leading Cases, 193; Fursdon *v.* Clogg, 10 Mee. & W. 574.

(*b*) See Davies *v.* Lowndes, 5 Bing. N. C. 161; Thomas *v.* Jenkins, 6 A. & E. 525; Barraclough *v.* Johnson, 8 A. & E. 99; Brisco *v.* Lomax, ibid. 198; Doe *v.* Hawkins, 2 Q. B. 212; Bradley *v.* James, 13 C. B. 822.

meanour on the occasion, it appeared to receive his assent (*c*).

Lastly, we may notice as a further rule, so far as written instruments are concerned, (and one of recent introduction,) that where the genuineness of a writing is in dispute, evidence on that point may be given, by witnesses speaking on *comparison* of such writing with any other writing which has been proved to the satisfaction of the judge to be genuine (*d*).

These rules relate to the *admissibility* of evidence in different cases (*e*). As to its *effect*, we may remark in general, that it may be either *positive* or *circumstantial* (*f*); by the former of which we commonly understand a proof of the very fact in question; by the latter a proof of circumstances from which, according to the ordinary course of human affairs, the existence of that fact may reasonably be *presumed* (*g*). And the strength

(*c*) 1 Stark. Ev. 50.

(*d*) 17 & 18 Vict. c. 125, s. 27.

(*e*) As to the inadmissibility in evidence of instruments chargeable with duty, if not properly stamped, vide sup. vol. I. p. 484, n. (*o*).

(*f*) Blackstone (vol. iii. p. 371) defines "circumstantial evidence" as the proof of such circumstances as "*either necessarily* or *usually* attend the fact itself."

(*g*) It is to be observed that the presumptions here referred to are of a different kind from the presumptions *of law* before mentioned, (vide sup. pp. 540, 541,) which are in truth mere legal maxims in the abstract, on which, as on other points of law, the jury are to follow implicitly the direction of the judge. But the presumptions now in question arise from special circumstances; and are inferences which in general the jury are at liberty to adopt or reject; though even here their discretion is in some instances controlled by precedent, or the manifest reason of the case. Thus (amongst other instances) we have legal decisions upon the sufficiency of the presumption of life, under particular circumstances; see Nepean *v.* Knight, 2 Mee. & W. 894; In re Benham's Trust, Law Rep., 4 Eq. Ca. 416; In re Beasney's Trusts, ib. 7 Eq. Ca. 498; In re Phené's Trusts, ib. 5 Ch. App. 139; of loss of ship, Green *v.* Brown, 2 Str. 1199; of seisin in fee, Jayne *v.* Price, 5 Taunt. 326; Doe *v.* Williams, 2 Mee. & W. 749; of death without issue, Doe *v.* Woolley, 8 B. & C. 22; Earl of Roscommon's case, 6 Clark & Fin. 97; of a reconveyance, Fenney *v.* Jones, 3 M. & Scott, 472; Doe *v.* Williams, 1 Mee. & W. 749; of unity of possession, Clayton *v.* Corby, 2 Gale &

of circumstantial or presumptive evidence varies according to the nature and particular combination of the facts proved. It may either be barely sufficient to decide the question, supposing no evidence to be offered to the contrary; or it may be strong enough to prevail against evidence offered on the other side, or even so violent as not to admit of being repelled by any adverse evidence whatever, except under very particular circumstances.

Such are the general principles of law relative to the evidence; which, it is to be observed, is required (subject to the power of the court, as enlarged, under the Judicature Act, 1873, to allow depositions or affidavits to be read in certain cases) to be given at the time of trial, in open court, in the presence of the judge and jury, as also of the parties, their attorneys, the counsel, and all by-standers (*h*); each party having liberty to except to its competency; which exceptions are publicly stated, and by the judge are openly and publicly allowed or disallowed in the face of the country; which must curb any secret bias or partiality that might arise in his own breast. And if either in his directions or decisions he mistakes the law by ignorance, inadvertence or design, the counsel on either side have hitherto been allowed to require him publicly to seal *a bill of exceptions*, stating the point wherein he is supposed to err; and this he was obliged to seal by the Statute of Westminster the second, 13 Edward I. c. 31 (*i*). This bill of exceptions was in the nature of an *appeal* and was examinable, not in the court out of which the record issued for the trial at *nisi prius*, but in the appellate court of Exchequer Chamber, the jurisdiction and powers of which have (as

D. 174; of authority as agent, Owen *v.* Barrow, 1 N. R. 101; Ward *v.* Evans, Salk. 442; of payment, Welch *v.* Seaborn, 1 Stark. Rep. 474; Oswald *v.* Legh, 1 T. R. 270; R. *v.* Stephens, 1 Burr. 434; of payment by cheque, Egg *v.* Barnett, 3 Esp. 196; of due stamping, Doe *v.* Coombs, 3 Q. B. 687.

(*h*) See 36 & 37 Vict. c. 66, s. 72, et Sched. r. 36.

(*i*) 3 Bl. Com. p. 372.

already explained) been transferred by the Judicature Act, 1873, to the court of appeal thereby established (*k*); and the bill of exceptions itself has accordingly been expressly abolished, by the rules of procedure annexed to the same statute (*l*). But a *demurrer* to the evidence is determinable by the court out of which the record is sent. This may arise where a record or other matter is produced in evidence, concerning the legal consequences of which there arises a doubt in law: in which case the adverse party may, if he pleases, demur to the whole evidence; and such demurrer admits the truth of every fact which has been alleged, but denies the sufficiency of them all, in point of law, to maintain or overthrow the issue (*m*); which draws the question of law from the cognizance of the jury to be decided by the court itself. But this proceeding, though not expressly abolished, has become wholly laid aside in modern practice; since the more frequent extension of the discretionary powers of the court in regard to a new trial, which is now commonly granted for the misdirection of the judge at *nisi prius* (*n*).

This open examination of witnesses *vivâ voce*, in the presence of all mankind, is much more conducive to the clearing up of truth than evidence taken down from their mouths in writing elsewhere and read afterwards in court, which, unless in exceptional cases, is not allowed (*o*); for a witness will often depose that in private which he would not have ventured to testify before a public and solemn tribunal. [In evidence so taken, moreover, an artful or careless scribe may make a witness speak what he never meant, by dressing up the depositions in his own form

(*k*) As to a bill of exceptions see Davenport *v.* Tyrrell, 1 W. Bl. 679; Bigge *v.* Parkinson, 7 H. & N. 955.

(*l*) 36 & 37 Vict. c. 66, Sched. r. 49.

(*m*) See Co. Litt. 72; 5 Rep. 104.

(*n*) 3 Bl. Com. p. 373. As to a new trial for misdirection, with regard to evidence, see 36 & 37 Vict. c. 66, Sched. r. 48.

(*o*) Vide sup. pp. 532, 533.

[and language; but the witness in open court is at liberty to correct and explain his meaning, if misunderstood, which he can never do after his written deposition is once taken. Besides all this, the occasional questions of the judge, the jury, and the counsel, propounded to the witnesses on a sudden, will sift out the truth much better than a formal set of interrogatories previously penned and settled; and the confronting of adverse witnesses is also another opportunity of obtaining a clear discovery, which can never be had upon any other method of trial. Nor is the presence of the judge, during the examination, a matter of small importance; for, besides the respect and awe with which his presence will naturally inspire the witness, he is able by use and experience to keep the evidence from wandering from the point in issue. In short, by this public and oral method of examination, and this only, the persons who are to decide upon the evidence have an opportunity of observing the quality, age, education, understanding, behaviour, and inclinations of the witness; in which points all persons must appear alike when their depositions are reduced to writing, and read to the judge in the absence of those who made them; and yet as much may be frequently collected from the manner in which the evidence is delivered, as from the matter of it (*p*).]

When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, sums up the whole to the jury; recapitulating in greater or less detail, as he may deem necessary, the statements of the witnesses, and the contents of the documents adduced on either side: commenting upon the manner in

(*p*) Blackstone (vol. iii. p. 374) remarks, that the public giving of testimony *ore tenus*, although familiar among the *antient* Romans, "as "may be collected from Quintilian, "who lays down very good instruc- "tions for examining and cross- "examining witnesses" (Instit. Orat. l. 5, c. 7), and continued as low as the time of Hadrian, (see Ff. 22, 5, 3,) is rejected by the modern civil law.

which they severally bear upon the issue, and giving his direction upon any matter of law that may arise upon them: but leaving the jury to determine for themselves the credit and weight to which they are respectively entitled, and to decide whether, upon the whole, the preponderance of proof is in favour of the plaintiff or defendant.

The jury, after the proofs are summed up, if they express a wish so to do, withdraw from the court to consider their verdict (*q*); and are kept till they are all unanimously agreed (*r*). [And if they eat or drink at all, or have any eatables about them, without consent of the court, and before verdict, it is fineable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict (*s*). Also, if they speak with either of the parties or their agents after they have gone from the bar, or receive any fresh evidence in private, or if, to

(*q*) 3 Bl. Com. p. 375. Blackstone adds that, "in order to avoid "intemperance and causeless delay "they are to be kept without meat, "drink, fire or candle, unless by "permission of the judge." It forms one of the provisions of the Juries Act, 1870, that jurors after having been sworn may, at the discretion of the judge, be allowed at any time before giving their verdict the use of a fire when out of court and reasonable refreshment to be procured at their own expense. (33 & 34 Vict. c. 77, s. 23.)

(*r*) "This necessity of a total "unanimity," (remarks Blackstone, vol. iii. p. 376,) "seems to be pecu-"liar to our own constitution, (see "Barring. on the Stat. 19, 20, 21); "or at least in the *nembda*, or jury "of the antient Goths (Stiern. l. i. "c. 4), there was required, even in "criminal cases, only the consent of "the major part; and in case of an "equality, the defendant was held "to be acquitted." The principle of requiring unanimity is attended at least with one practical advantage of the utmost importance; that in the event of a difference of opinion, it secures a discussion, and enables any one dissentient juror to compel the other eleven fully and calmly to reconsider the question. Some remarks will be found on this subject in the Third Report of the Common Law Commissioners appointed in 1828, p. 70; who recommended that if, after a deliberation of twelve hours, nine out of the twelve concur, their verdict should be received.

(*s*) Hughes *v.* Budd, 8 Dowl. P. C. 315; but see Morris *v.* Vivian, 10 Mee. & W. 137, where it was held to be a matter for the discretion of the court, whether they would grant a new trial under such circumstances.

[prevent disputes, they cast lots for whom they shall find, —any of these circumstances will vitiate the verdict. And by the antient rule, (which, in strictness, seems to be still in force,) if the jurors do not agree in their verdict before the judges are about to leave the town, though they are not to be threatened or imprisoned (*t*), the judges are not bound to wait for them; but may carry them round the circuit, from town to town (*u*).] In practice, however, if the jury are unable to agree upon their verdict, one of them is often *withdrawn* by consent of the parties to the suit, so that no verdict can be given (*x*); or the whole jury may (with the like consent) be *discharged* from finding any verdict (*y*); or, again, they may (even without such consent) be discharged by the *judge*, after having retired for a considerable time for deliberation (*z*).

[When they are all unanimously agreed, the jury return back to the bar; and before they deliver their verdict the plaintiff is bound to appear in court, by himself, attorney, or counsel, in order to answer the amercement, to which by the old law he was liable in case he failed in his suit, as a punishment for his false claim (*a*). To be *amerced*, or *a mercie*, is to be at the mercy of the Crown with regard to the fine to be imposed; *in misericordiâ domini regis pro falso clamore suo.*] The amercement is disused, but an allusion to it may still be traced; for if the plaintiff does not appear, no verdict can be given, and the plaintiff is then said to be *nonsuit; non sequitur cla-*

(*t*) Mirrour, c. 4, s. 24.

(*u*) Lib. Ass. fol. 40, p. 11. See a note in 1 B. & Smith, p. 429, with regard to this alleged antient custom. See also Reg. *v.* Winsor, Law Rep., 1 Q. B. 305.

(*x*) Stodhart *v.* Johnson, 3 T. R. 657; Harries *v.* Thomas, 2 Mee. & W. 38. If a juror be withdrawn by consent, and the action be afterwards proceeded with, or a fresh action brought, the defendant may apply to stay proceedings. Gibbs *v.* Ralph, 15 L. J. (Ex.) 7.

(*y*) Everett *v.* Youells, 3 B. & Ad. 349. As to the distinction observable between a discharge of the jury without giving a verdict, in civil and in criminal cases, see The Queen *v.* Charlesworth, 1 B. & Smith, 460.

(*z*) See Seally *v.* Powis, 3 Dowl. 372; R. *v.* Johnson, 5 Ad. & El. 513.

(*a*) Finch, L. 189, 252.

morem suum. Therefore, it has been usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain the issue, to be voluntarily nonsuited or withdraw himself; whereupon the crier is ordered to *call the plaintiff;* and if neither he nor anybody for him appears, he is nonsuited, the jurors are discharged, the action is at an end, and the defendant shall recover his costs. The reason of this practice is, that after a nonsuit, which is only a default, the plaintiff has been allowed to commence the same suit again for the same cause of action; but after a verdict had for the defendant and judgment consequent thereupon, he is for ever barred, unless the judgment be afterwards reversed, from afterwards attacking the defendant upon the same ground of complaint (*b*). But in case the plaintiff appears, the jury, by their foreman, deliver in their verdict (*c*).

By the verdict, (*verè dictum,*) they openly declare themselves to have found the issue or issues they have had to try, for the plaintiff, or for the defendant (*d*); and

(*b*) It forms, however, one of the provisions of the rules of procedure annexed to the Judicature Act, 1873, that any judgment of nonsuit, *unless the court or judge otherwise directs*, shall have the same effect as a judgment upon the merits for the defendant; but may be set aside in any case of mistake, surprise or accident. (36 & 37 Vict. c. 66, sched. r. 46.)

(*c*) A plaintiff cannot be nonsuited against his will. (See Dewar *v.* Purday, 3 Ad. & El. 166.)

(*d*) The verdict is said in our books to be either *privy* or *public*—and it is stated by Blackstone, (vol. iii. p. 377,) that "a privy verdict is "when the judge hath left or adjourned the court, and the jury "being agreed, in order to be delivered from their confinement, "obtain leave to give their verdict "privily to the judge out of court;" though he adds, that, "if the judge "hath adjourned the court to his "own lodgings, and there receives "the verdict, it is a *public* and not "a privy verdict." He also states that a privy verdict is of no force, unless afterwards affirmed openly in court, and that the jury may then vary from it, if they please; and that it is "a dangerous practice, "allowing time for the parties to "tamper with the jury, and therefore very seldom indulged in." At the present day it is wholly disused.

if for the plaintiff, they also, in certain actions at the same time assess the damages by him sustained in consequence of the injury of which he has made complaint (*d*).

Occasionally, if there arises upon the facts proved in the case, any difficult matter of law, the course has been taken of finding a *special* verdict—a course grounded on the Statute of Westminster, 13 Edw. I. c. 30, s. 2, and the adoption of which is entirely at the choice of the jury (*e*). A verdict of this description is drawn up in the form of making the jury state the naked facts, as they find them to be proved; concluding conditionally, that if upon the whole matter the court shall be of opinion that the issue ought to be found for the plaintiff, they then find for the plaintiff, and assess the damages accordingly; if otherwise, then for the defendant. This is entered at length on the record, and afterwards argued and determined in the court above as in the case of a demurrer.

Another method of finding a species of special verdict, which has been sometimes adopted, is when the jury find a verdict, generally, for the plaintiff, but subject, nevertheless,—as the law of the case is doubtful,—to the opinion of the court above, on a *special case*, stated by the counsel on both sides, and containing a statement of facts mutually agreed upon. The proceeding by way of special case is in general similar to that by way of special verdict, the chief difference, indeed, between them being, that it has not been the practice to enter a special case upon the

(*d*) By 3 & 4 Will. 4, c. 42, s. 28, the jury may, upon the trial of any issue or inquisition of damages allow *interest* at the current rate upon debts from the time when they were payable, if made payable by a written instrument, and at a time certain; or if payable otherwise, then from the time when demand of payment shall have been made in writing, with notice that interest will be claimed. (See Mowatt *v.* Lord Londesborough, 4 Ell. & Bl. 1.) And, by sect. 29, they may give damages *in the nature* of interest, in actions of trover and trespass *de bonis asportatis*, over and above the value of the goods; and also, in actions on policies of assurance, over and above the money insured.

(*e*) See Mayor of Devizes *v.* Clark, 3 A. & E. 506.

record. Among things common to both, it may also be remarked that neither proceeding can take place without consent of the jury (though in practice they never object to what the parties propose on the subject), as the rule of law is, that the jury are always at liberty, without either special verdict or special case, to find their verdict absolutely, if they think fit, either for plaintiff or defendant (*f*).

[When the jury have delivered in their verdict, and it is recorded in court, they are then discharged. And so ends the trial by jury;—a trial which, besides the other vast advantages which we have occasionally observed upon in describing its progress, is also as expeditious, and cheap, as it is convenient, equitable, and certain: and indeed the trial by jury ever has been looked upon as the glory of the English law. In estimating its advantages it is to be considered, that if the administration of justice be entirely entrusted to the magistracy, a select body of men, and those generally selected by the sovereign, or such as enjoy the highest offices in the state, their decisions, in spite of their own natural integrity, will frequently have an involuntary bias towards those of their own rank and dignity, —for it is not to be expected from human nature, that *the few* should be always attentive to the interests and good of *the many*. On the other hand, if the power of judicature were placed at random, in the hands of the multitude, their decisions would be wild and capricious, and a new rule of action would be every day established in our courts. It is wisely therefore ordered, that the principles and axioms of law, which are general propositions flowing from abstracted reason, and not accommodated to times or to men, should be deposited in the breasts of the judges, to be occasionally applied to such facts as come properly ascertained before them. For here partiality can have little scope; the law is well known, and is the same for all

(*f*) Litt. s. 368; Fryer *v.* Roe, 13 C. B. 427. The rules of procedure annexed to the Judicature Act, 1873, contain no reference to any species of special verdict.

[ranks and degrees; it follows as a regular conclusion from the premises of fact pre-established. But in settling and adjusting a question of fact, when entrusted to any single magistrate, partiality and injustice have an ample field to range in; either by boldly asserting that to be proved which is not so, or by more artfully suppressing some circumstances, stretching and warping others, and distinguishing away the remainder. Here, therefore, a competent number of sensible and upright jurymen, chosen by lot from among those of the middle rank, will be found the best investigators of truth, and the surest guardians of public justice (*g*).]

2. *Trial before a Judge.*—This was a mode of trial first introduced into modern practice by "The Common Law Procedure Act, 1854," (and recognized by "The Judicature Act, 1873,") which dispenses with a jury under certain circumstances (*h*). For by the former, it was enacted, that the parties to any action might by consent in writing, signed by them or their solicitors, leave the decision of any issue of fact to the court, provided the court or a judge should in their or his discretion think fit to allow such trial; and that such issue might thereupon be tried and damages assessed when necessary in open court by any judge who might otherwise have presided at the trial thereof by jury, either with or without the assistance of any other judge or judges of the same court or included in the same com-

(*g*) 3 Bl. Com. p. 380. The institution of the County Courts, in which the decision of matters of fact as well as law is generally intrusted to the judge, must not be considered as any indication that the views of Blackstone on the subject to which the above extract refers, are disregarded at the present day. For though in favour of the great objects of cheapness and dispatch, trial by jury has (as the general rule) been dispensed with in these courts, yet either of the parties is entitled to insist on that mode of decision, where the claim exceeds 5*l.*; and it may be granted (in the discretion of the judge) even in cases below that amount. (Vide sup. p. 289).

(*h*) The idea of this method of trial appears to have been taken from the trial by *witnesses per testes*, mentioned by Blackstone, vol. iii p. 336.

mission at the assizes (*i*). And by the rules of procedure annexed to the latter Act, one of the modes given for the decision of an action is a trial before a judge or judges (*j*).

3. *Trial before Referees.*—We have in a former part of this work explained that one of the remedies for an injury suffered is the reference by the parties themselves of the matters in dispute to the arbitration of some person or persons by them selected and by whose decision they consent to abide (*k*). And this method of decision was by "The Common Law Procedure Act, 1854" (17 & 18 Vict. c. 125), adopted into the proceedings in an action, it being by that statute provided that if at any time after the issuing of the writ of summons it should be made to appear to the satisfaction of the court or a judge, upon the application of either party, that the matter in dispute consisted wholly or in part of matters of mere account which could not conveniently be tried in the ordinary way,—it should be lawful for the court or a judge either themselves to decide the matter in a summary way or to order that the same should be *compulsorily* referred to an arbitrator appointed by the parties or to an officer of the court, upon such terms as to costs and otherwise as such court or judge should think reasonable (*l*).

"The Judicature Act, 1873," contains enactments on the subject of compulsory references in an action, which will render the above provisions, though not repealed, of less importance in the future. For by that Act, it is enacted, that, subject to rules of court and existing rights, any question arising in any cause or matter (other than a criminal proceeding by the crown) before the High

(*i*) 17 & 18 Vict. c. 125, s. 1. See Andrews *v.* Elliott, 5 Ell. & Bl. 502; 6 Ell. & Bl. 338.

(*j*) 36 & 37 Vict. c. 66, sched. r. 30.

(*k*) Vide sup. p. 259.

(*l*) 17 & 18 Vict. c. 125, ss. 3, 6. As to these provisions see Brown *v.* Emerson, 17 C. B. 361; Chapman *v.* Van Toll, 8 Ell. & Bl. 396.

Court of Justice or before the Court of Appeal may be referred for inquiry and report to an *official* or *special* referee, whose report, if adopted, may be enforced as a judgment (*n*). Moreover, by consent of the parties, and without such consent in any cause or matter requiring any prolonged examination of documents or accounts, or any scientific or local investigation which cannot, in the opinion of the court or a judge, be conveniently made before a jury or conducted by the court through its other ordinary officers, any question or issue of fact, or any question of account arising therein, may be ordered to be tried either before an official or a special referee, (with or without assessors,) whose report shall be equivalent to the verdict of a jury (*o*).

These official referees are permanent officers directed by the Act to be attached to the Supreme Court; and their number, qualification and tenure of office is to be determined by the Lord Chancellor, with the concurrence of the presidents of the divisions of the High Court of Justice or a majority of them (of which majority the Lord Chief Justice of England shall be one), and with the sanction of the Treasury (*p*). And they are to perform the duties entrusted to them in such places, whether in London or in the country, as may be directed by order of court (*q*).

Where a reference has been made to a referee, he is authorized, subject to the order of the court or a judge, to hold the trial at any place which he may deem convenient, and have any inspection or view, either by himself or with his assessors, if any, which he may deem expedient for the better disposal of the controversy before him; and, unless otherwise directed, shall proceed with the trial in open court *de die in diem* in a similar manner as in actions tried by a jury (*r*).

(*n*) 36 & 37 Vict. c. 66, s. 56.
(*o*) Sects. 57, 58, sched. r. 30.
(*p*) Sect. 83.
(*q*) Ibid.
(*r*) Sched. r. 34.

He may also, before the conclusion of any trial before him, or by his report, submit any question arising therein, or state any facts specially, for the decision of the court; and the court shall have power to require any explanation or reasons from the referee, or to remit the action or any part thereof for re-trial or further consideration to the same or any other referee (*s*).

IV. The issues of law, equity or fact having been decided in the several methods above described, and it thus being ascertained whether the plaintiff is entitled to maintain his action, or the defendant, on the other hand, to be discharged therefrom, the next step is the *judgment* (or *decree*), that is, the formal award of redress in the one case, or discharge in the other (*t*). And as regards an issue in law or in equity raised on demurrer or otherwise, we have already been led in part to advert to this proceeding (*u*); the judgment in that case being in effect given at the time that the court deliver their opinion or decision upon the legal or equitable question brought before them, though it is not formally drawn up and entered on record till afterwards (*x*). But if the issue be an issue in fact, and tried by a jury, the course of practice is as follows.

In the first place, whatever has been done subsequently to the joining of issue, and the awarding of the trial, is entered on the back of the nisi prius record, and is called the *postea;* the substance of which is, that *afterwards* the said plaintiff and defendant appeared at the place of trial, and a jury being sworn, found such a verdict; or that

(*s*) 36 & 37 Vict. c. 66, sched. r. 35.

(*t*) In the Judicature Act, 1873, the term "judgment" is to include "decree." (Sect. 100.)

(*u*) Vide sup. p. 511.

(*x*) The judgment of the court above referred to is only as to whether some pleading demurred to is or is not sufficient. But a judgment in an action in which a *legal* remedy is sought and one in an action in which *equitable* relief or redress is desired must essentially differ in their nature one from the other.

the plaintiff, after a jury sworn, made default, and did not prosecute his suit, or as the case may happen (*y*).

The unsuccessful party may then, within such interval of time as the practice allows for the purpose, move the court for a *new trial*, or for *arrest of judgment*, or for *judgment non obstante veredicto*, or for a *repleader* (*z*).

And, 1. As to the motion for a *new trial*. [The ground of this may be an irregularity in the proceedings connected with the trial, such as want of notice of trial; or any other matter *dehors*, (that is, extrinsic to,) the record, tending to show, that, though the trial may have been in due form, yet it has not done justice between the parties; as, for example, any flagrant misbehaviour of the party prevailing towards the jury, which may have influenced their verdict; or any gross misbehaviour of the jury among themselves; or that it appears to the court, that the jury have brought in a verdict without, or contrary to, evidence (*a*), so that he is reasonably dissatisfied therewith: or that they have given exorbitant or insufficient damages; or that the judge himself has misdirected the jury, so that they found an unjustifiable verdict. For any of these reasons, or for any of a similar kind, it is competent to the unsuccessful party, whether plaintiff or

(*y*) The *postea* is not referred to in the rules of procedure annexed to the Judicature Act, 1873, but an analogous practice to that now in use will probably be prescribed.

(*z*) In addition to the applications mentioned in the text, the defendant may also move *to enter a nonsuit*, or the plaintiff to *set aside a nonsuit, and enter a verdict*;—the effect being, in either case, if the rule is granted, and made absolute, that no second trial is required. But such motions can only be made as *upon a point reserved*, that is, by leave of the judge who tried the cause, granted during the course of the trial. By 17 & 18 Vict. c. 125, s. 33, it was provided, that in every rule *nisi* for a new trial, or to enter a verdict, or nonsuit, the *grounds* upon which such rule has been granted, should be shortly stated. (See Grayson *v.* Andrews, 10 Exch. 427.)

(*a*) Where a new trial is ordered on the ground that the verdict was *against evidence*, it was directed by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 44, that the costs of the first trial should *abide the event* of the action.

[defendant, to move that the verdict that has been given be set aside, and a new trial had: the effect of which motion, if granted, is, that a trial of the same issue, (by a new jury duly summoned and impanelled as in other cases,) is instituted *de novo* (*b*).

The exertion of these superintendent powers of the court in setting aside the verdict, and granting a new trial on account of misbehaviour of the jurors, is of a date extremely antient. There are instances, in the Year Books of the reigns of Edward the third (*c*), Henry the fourth (*d*), and Henry the seventh (*e*),—of a judgment being stayed (even after a trial at bar), and new trial awarded, because the jury had eaten and drunk without consent of the judge, and because the plaintiff had privately given a paper to a juryman, before he was sworn. And upon these the chief justice, Glynn, in 1655, grounded the first precedent that is reported in our books (*f*) for granting a new trial upon account of *excessive damages* given by the jury; apprehending with reason, that notorious partiality in the jurors was a principal species of misbehaviour. At that period, however, it was clearly held for law that whatever matter was of force to avoid a verdict ought to be returned upon the *postea*, and not merely surmised by the court,—lest posterity should wonder why a new trial was awarded, without any sufficient reason appearing upon the record (*g*). But very early in the reign of Charles the second, new trials were granted upon *affidavits* (*h*); and the former strictness of the courts of law in respect

(*b*) If the fresh trial be ordered in consequence of a mis-trial apparent on the record, the award has been a *venire de novo*. As to such award, see Wood *v.* Bell, 6 Ell. & Bl. 355, 363.

(*c*) 24 Edw. 3, 24; Bro. Ab. tit. Verdite, 17.

(*d*) 11 Hen. 4, 18; Bro. Ab. tit. Enquest, 75.

(*e*) 14 Hen. 7, 1; Bro. Ab. tit. Verdite, 18.

(*f*) Style, 466.

(*g*) See Graves *v.* Short, Cro. Eliz. 616; Palm. 325; 1 Brownl. 207.

(*h*) See R. *v.* Lord Fitz-Water, 1 Sid. 235; Goodman *v.* Cotherington, 2 Lev. 140.

[of new trials having driven many parties into courts of equity to be relieved from oppressive verdicts, they grew more liberal in granting them; and at length the present maxim was adopted, that in all cases of moment, where justice is not done upon one trial, the injured party is entitled to another (*i*). Nor can there be any doubt that this is a reasonable and salutary course of practice. If every verdict was final in the first instance, it would tend to destroy this valuable method of trial. For either party may be surprised by a piece of evidence which, had he known it was about to be produced, he could have explained or answered; or may be puzzled by a legal doubt which a little recollection would have solved. Besides, in the hurry of a trial, the ablest judge may mistake the law, and misdirect the jury; he may not be able so to state and range the evidence as to lay it clearly before them, nor to take off the artful impressions which have been made on their minds by learned and experienced advocates. The jury, moreover, give their opinion *instanter*, that is, before they separate, eat or drink; and under these circumstances the most intelligent and best intentioned men may bring in a verdict which they themselves upon cool deliberation would wish to reverse. Granting a new trial, under proper regulations, cures all these inconveniences; and at the same time preserves entire, and renders perfect, that most excellent method of decision which is the glory of the English law. A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party, as if it had never been heard before. No advantage is taken of the former verdict on the one side, or the rule of court for awarding such second trial, on the other; and the subsequent verdict, though contrary to the first, imports no blame upon the former jury; who, had they possessed the same lights and advantages, would probably have altered their own opinion. The parties come better

(*i*) Bright *v.* Eynon, 1 Burr. 395.

[informed, the counsel better prepared, the law is more fully understood, and nothing is now tried but the real merits of the case. A sufficient ground, however, must be laid before the court, to satisfy them that it is necessary to justice that the cause should be further considered. If the matter be such as did not, or could not, appear to the judge who presided at the trial, it is disclosed to the court by affidavit; if it arises from what then passed, it is taken from the judge's information, who usually makes a special and minute report of the evidence. Counsel are heard on both sides, to impeach or establish the verdict; and the court give their reasons at large, why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, false colours are taken off, and all points of law which arose at the trial are, upon full deliberation, clearly explained and settled. Nor do the courts lend too easy an ear to every application for a review of the former verdict. They must be satisfied, that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case. A new trial is not granted, where the matter is too inconsiderable to merit a second examination. It is not granted upon nice and formal objections, which do not go to the real merits. It is not granted in cases of strict right or *summum jus*, where its enforcement is not reconcileable to conscience. Nor is it granted where the scales of evidence hang nearly equal: but that which leans against the former verdict ought always strongly to preponderate (*k*).] And we may here remark that in

(*k*) In antient times the principal remedy for reversal of a verdict unduly given was by writ of *attaint*, which was a proceeding for setting aside, by a jury of twenty-four, the verdict of a jury of twelve; the effect of which was, that if the jury of twelve were found to have given a false verdict, they incurred infamy, with imprisonment and forfeiture of their goods; which two latter punishments were in course of time commuted into a pecuniary penalty. For it was deemed at the early period when this proceeding was first established,—when the con-

analogy to the practice which has hitherto required an application for a new trial to be made to the court *in banc*, the Judicature Act contains a provision that every motion for a new trial of any cause or matter on which a verdict has been found by a jury, or by a judge without a jury, shall be heard before a divisional court (*l*). And the rules of procedure annexed to the same Act, contain an express provision that a new trial shall not be granted on the ground of misdirection or of the improper admission or rejection of evidence, unless in the opinion of the court to which the application is made, some substantial wrong or miscarriage has been thereby occasioned in the trial of the action; and if it appear to such court that such wrong or miscarriage affects part only of the matter in controversy, such court may give final judgment as to part thereof and direct a new trial as to the other part only (*m*).

2. *Arrests of judgment* arise from *intrinsic* causes appearing on the face of the record, showing that, notwithstanding any verdict given for the plaintiff, he is not entitled to judgment; and it is only on the part of the defendant, therefore, that a motion in arrest of judgment is made. As if, in an action for slanderous words, the defendant denies the words, and issue is joined thereon, now if a verdict be found for the plaintiff, that the words were actually spoken as affirmed, here—though that fact is established, yet the defendant may move the court in

stitution of juries was different from what it now is, and they were summoned *to testify on their own knowledge* as to the truth of the facts in dispute, (see Plac. Ab. 3, Norfolc. &c.; 2 Hist. of Eng. Law, by Reeves, p. 270, &c.)—that a false verdict must necessarily be a perjured one. The writ of attaint was a form of proceeding at least as old as the reign of Henry the second; and remained in force, (though quite fallen out of use,) till abolished by the stat. 6 Geo. 4, c. 50, s. 60. (3 Bl. Com. pp. 388, 402.)

(*l*) 36 & 37 Vict. c. 66, s. 48. Unless a motion be so made, no *appeal* will lie from any judgment founded on and applying a verdict. From such motion an appeal lies to the Court of Appeal. (Ibid.)

(*m*) 36 & 37 Vict. c. 66, sched. r. 48.

banc out of which the record issued, in arrest of judgment, that the words are not in their nature actionable; and if the court be of that opinion, the judgment shall be arrested, and never entered for the plaintiff. And it may be laid down generally, that whatever objection, in point of substance, the defendant might have taken at an earlier stage, by way of demurrer, he is also entitled to take at this stage, in arrest of judgment; but no more in this shape, than in the other, can he be allowed to bring forward any objection in point of mere form. The case was formerly very different; for by the antient law, even the most trifling objection in point of form, might be alleged in arrest of judgment; though in somewhat later times, by the statutes of *amendment* and *jeofail*,—so called because when a pleader, in the days of oral pleading, perceived any slip in the form of his allegation, he acknowledged such error by the expression of *j'ay faillé*, and obtained liberty to amend,—objections of mere form not brought forward by way of *special demurrer*, (which was the proper method for taking formal objections,) were, at a subsequent stage of the cause, cured or *aided* (*n*). But it was provided, by the Common Law Procedure Act, 1852, that no judgment should be arrested, stayed, or reversed, for any imperfection, omission, defect in or lack of form (*o*); and, that where a motion should be made in arrest of judgment by reason of the omission to allege some material fact, or other cause, the plaintiff should be at liberty, by leave of the court, to enter a suggestion of the existence of the matter omitted, or any matter which, if true, would remedy the alleged defect; to which the defendant should be at liberty to plead, and the parties thereon proceed to issue and trial, as in ordinary cases (*p*). Under the Judicature Act, 1873, the motion for an

(*n*) See Wilkinson *v.* Sharland, 10 Exch. 724.

(*o*) 15 & 16 Vict. c. 76, s. 50.

(*p*) Sects. 143, 144. See Manby *v.* Boycott, 2 Ell. & Bl. 46; Fisher *v.* Bridges, ibid. 128, n.

arrest of judgment is to be heard before a divisional court (*q*).

3. A motion to the court in banc for *judgment non obstante veredicto*, is also made in respect of some intrinsic objection apparent on the face of the record: but differs in this particular, from the motion in arrest of judgment, that it is usually made on the part of the plaintiff, and not of the defendant; and is accordingly grounded on an objection to the case of the latter, and not of the former party (*r*). Thus, where the plea *confesses*, and attempts to *avoid*, the declaration, by some matter which amounts to no sufficient avoidance of it in point of law, and the plaintiff, instead of demurring, has taken issue upon the truth of the plea in fact, and that issue has been found in favour of the defendant,—yet the plaintiff may move that, without regard to the verdict, the judgment be given in *his* favour. For the plea having confessed the matter of fact in the declaration, and having opposed it by an allegation which, though true in fact, is bad in law, it appears upon the whole that the plaintiff is entitled to maintain his action (*s*). But the same rule applies to the motion for judgment *non obstante veredicto*, as to the motion in arrest of judgment, that it can be founded on no objection of a merely formal kind, but only on such as involves the substance and merits of the controversy. And the same practice obtains upon the motion now in question, as upon the other, of allowing the party whose pleading is in fault, to enter a suggestion of any matter of fact, which, if true, would remedy the alleged

(*q*) 36 & 37 Vict. c. 66, s. 48.

(*r*) See Reg. *v.* Darlington School, 6 Q. B. 682, in which case Parke, B., said it might be made by *defendant* if the plaintiff's reply confessed, but failed to avoid, the plea.

(*s*) As to judgment *non obstante*, &c., see Gilb. C. P. 126; Lambert *v.* Taylor, 4 Barn. & Cress. 138; Merry *v.* Chapman, 8 A. & E. 524, n.; Negelen *v.* Mitchell, 7 Mee. & W. 612; Atkinson *v.* Davies, 2 Dowl. N. S. 778; Shrewsbury *v.* Blount, 2 Man. & Gr. 508; Beaty *v.* Warren, 4 Man. & Gr. 158; Pim *v.* Grazebrook, 2 C. B. 429.

defect (*t*). Under the Judicature Act, 1873, this motion, also, is directed to be heard before a divisional court (*u*).

4. The motion for a *repleader* is, where by the misconduct or inadvertence of the pleaders, the issue is joined on a fact totally immaterial or insufficient to determine the right, so that the court upon the finding cannot know for whom judgment ought to be given. As if in an action against an executor, the defendant, instead of pleading that the testator made no such promise as alleged in the declaration, pleads that he *himself* made no such promise (*x*); or, if in an action of debt on bond conditioned to pay ten pounds ten shillings on a certain day, the defendant merely pleads payment of ten pounds (*y*),—in such cases the court will, after a verdict, award a repleader, (*quod partes replacitent*); the effect of which is, that the pleadings must begin *de novo* at that stage of them, wherein there appears to have been the first defect or deviation from the regular course. But repleaders have not of late been usual; for they are awarded only where it is apparent to the court that the case of the party in default might probably be made good by a different manner of pleading (*z*). It has besides been a rule, that a repleader has been refused in favour of the party who made the first fault, when the issue has been found against that party (*a*); nor is it granted in any case except where complete justice could not otherwise be attained (*b*).

If the judgment on the verdict is not, by some of the

(*t*) 15 & 16 Vict. c. 76, ss. 143, 144.

(*u*) 36 & 37 Vict. c. 66, s. 48.

(*x*) 2 Vent. 196.

(*y*) See Kent *v.* Hall, Hob. 135; and see Spong *v.* Wright, 9 Mee. & W. 629; Atkinson *v.* Davies, 2 Dowl. N. S. 778.

(*z*) R. *v.* Phillips, Burr. 301, 302; 3 Bl. Com. 395; and see Negelen *v.* Mitchell, 7 M. & W. 612.

(*a*) Bennett *v.* Holbeck, 2 Saund 319 c; and see Gordon *v.* Ellis, 7 M. & G. 607.

(*b*) Goodburne *v.* Bowman, 9 Bing. 532. Neither the Judicature Act, nor the rules of procedure thereto annexed, mention a repleader.

means above pointed out, suspended or averted within the period allowed for the purpose, it follows that the party who obtained it is entitled to judgment, at any time after the expiration of that period (*c*).

He accordingly then proceeds to *sign* judgment; that is, to obtain the certificate of the proper officer of the court that judgment is given in his favour; which, (in the case of a judgment upon verdict,) stands in the place of any actual delivery of it by the judges themselves. And, upon the signing of the judgment, *costs* are also (as the general rule) taxed in his favour by the same officer;—a subject on which we shall presently have occasion to speak more at large.

After signing judgment, the next step is to *enter the judgment on record*, by transcribing the whole proceedings on a parchment roll, and depositing this roll, and filing it of record, in the office of the court; and this, though properly the act of the court, is in practice performed, whenever it takes place, by the successful party, or rather by his solicitor (*d*).

Hitherto we have pursued the history of an action that comes to issue through the instrumentality of pleading. But its course may be of a different and more summary

(*c*) By 15 & 16 Vict. c. 76, s. 120, the party obtaining a verdict was enabled to sign judgment and issue execution in *fourteen* days after trial, unless the judge who tries the cause, or some other judge, or the court, should otherwise order. But in such case, the opposite party will be entitled to move the court that the *judgment and execution may be set aside*, and a new trial granted, or such other relief as the case may require; or he may, after verdict against him, apply to a judge for an order to *stay execution* with a view to his making a motion to the court.

(*d*) No entry of the judgment on record, is, in the majority of cases, in fact ever made: but on signing judgment, the form is pursued of making an *incipitur* on the paper on which it is signed (called the *judgment paper*), that is, an entry of the initial words in which the judgment *would* be recorded. No mention is made of this step in the rules of procedure annexed to the Judicature Act, 1873, but it may be conjectured that there will be no substantial change in the practice.

kind. Thus it was provided by the Common Law Procedure Act, 1852, with a view to avoid where practicable the expense and delay attendant upon pleading, that where there was any question *of fact* in dispute between the parties, the decision of which they agreed should settle the controversy, they might at any time after writ of summons, and before judgment, state such question in the form of an issue, but without pleadings; and that such issue might be entered for trial, and tried accordingly, in the same manner as an issue joined in the ordinary way; or, if agreed on the facts, that they might state any question *of law* in a special case for the opinion of the court, without any pleadings: and might in either case agree, that, upon the finding of the jury on such issue, or upon the opinion of the court being given on such question, judgment might be entered for any specified sum of money to be paid by one of the parties to the other (*e*). Again, it may happen that one of the parties becomes entitled to judgment before any issue is attained. For in an action judgment will be awarded, not only where (as hitherto supposed) the facts are confessed by the parties, and the question of law or equity determined by the court (as in the case of judgment upon *demurrer*), or where the law or equity is admitted by the parties, and the facts disputed (as in the case of judgment on a *verdict*),—but also where both the fact and the law or equity arising thereon are admitted by the defendant. Of this kind is judgment by confession, which has been otherwise called judgment on *cognovit actionem*;—and judgment for default of appearance to the writ of summons, and for de-

(*e*) 15 & 16 Vict. c. 76, s. 42—48. (See Bishop *v.* Elliott, 11 Exch. 113.) It forms one of the provisions of the rules of procedure annexed to the Judicature Act, 1873, that the court or a judge may direct any question of law to be raised for its opinion by way of *special case* or otherwise, should it appear from the pleadings or otherwise that it may conveniently be decided before evidence given or any question or issue in fact tried, or reference made, to a referee or an arbitrator. (36 & 37 Vict. c. 66, sched. r. 24.)

fault of any defence made to the plaintiff's statement; which last has been called judgment by *nihil dicit.* And, lastly, judgment will be awarded where the plaintiff is convinced that either the fact or law or equity is insufficient to support his action, and therefore abandons his action; which is the case of a judgment upon a *nonsuit* (*f*), and also of a judgment upon *nolle prosequi* (*g*). In all these cases, however, the practical course is so far the same, that the successful party proceeds, upon the matter being terminated in his favour, to sign judgment, and enter it on record, in manner above described.

The judgment, though pronounced or awarded by the judges, (or supposed to be so, where no actual delivery of it takes place,) is, properly speaking, not *their* determination or sentence, but the determination and sentence of *the law* or of *equity.* It is the conclusion that naturally and regularly follows from the premises, which stand thus: Against him who hath ridden over my corn, I may recover damages by law, or may restrain him for the future by injunction; but A. hath ridden over my corn; therefore I shall recover damages against A., or obtain an injunction against his doing so for the future. If the major proposition be denied, this is a demurrer in law or in equity; if the minor, it is then an issue in fact; but if both be confessed, (or determined to be right,) the conclusion or judgment of the court cannot but follow; which judgment or conclusion depends not therefore on the arbitrary caprice of the judge, but on the settled and invariable principles of justice. The judgment, in short, is the remedy prescribed for the re-

(*f*) As to the discontinuance of the action by the plaintiff before receipt of, or before taking any step on, the defendant's statement of defence, see 36 & 37 Vict. c. 66, sched. r. 46; which proceeds to prohibit the plaintiff's *withdrawing the record* or discontinuing the action, at any later stage, without leave of the court or a judge.

(*g*) As to judgment by *nolle prosequi*, see 3 & 4 Will. 4, c. 42, s. 32; Bowden *v.* Horne, 7 Bing. 716; Fagan *v.* Dawson, 4 Man. & G. 711; Boyle *v.* Webster, 21 L. J. (N. S.) Q. B. 202.

dress of injuries, and the action is the vehicle or means of administering it. What that remedy may be, is indeed the result of deliberation and study to point out; and therefore the style of the judgment is, not that it is decreed or resolved by the court,—for then the judgment might appear to be their own; but "it is considered," *consideratum est per curiam,* that the plaintiff do recover his damages, his debt, his possession, or that he do have his injunction, and the like; which implies that the judgment is none of their own, but the act of law or equity, pronounced and declared by the court after due deliberation and inquiry (*h*).

Judgments are either *interlocutory* or *final.* An *interlocutory* judgment is such as is given upon some defence, proceeding, or default, which is only intermediate, and does not finally determine or complete the action. Of this nature is the judgment for the plaintiff, which is given on a demurrer to a plea in abatement; for thereby it is considered by the court that the defendant do answer over, *respondeat ouster;* that is, put in a more substantial plea. It is easy to observe that the judgment here given is not final, but merely interlocutory; for there are afterwards further proceedings to be had, when the defendant hath put in a better defence.

But the interlocutory judgments most usually spoken of are those incomplete judgments whereby the *right* of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained; a matter which (as the general rule) requires the intervention of a jury. This happens where the defendant suffers judgment to go against him by *confession,* or *for default of plea,* in any action brought for recovery of damages. In such a case as this, the entry of the judgment has been, that the plaintiff ought to recover his damages (indefinitely); but because the court know not what damages

(*h*) 3 Bl. Com. 396.

the said plaintiff hath sustained, therefore let the sheriff, by the oaths of twelve honest and lawful men, inquire into the said damages, and let the said inquisition be returned into court. This process is called a *writ of inquiry* (*i*); in the execution of which the sheriff, by his under-sheriff, sits as judge, and tries by a jury,—subject to nearly the same law and conditions as apply to the trial by jury at *nisi prius*,—what damages the plaintiff hath really sustained; and when their verdict is given, which must assess *some* damages, the sheriff returns the inquisition, which is entered upon the roll, in manner of a *postea*,—and thereupon it is considered that the plaintiff *do* recover the exact sum of the damages so assessed. In like manner, when a demurrer is determined for the plaintiff in an action wherein damages are claimed, the judgment is entered in the same interlocutory form, and is followed by a like writ of inquiry. But in many cases though the action is brought in point of form for damages, (or *sounds* in damages, according to the technical term,) yet the amount recoverable by the plaintiff is substantially a matter of mere calculation, and one therefore upon which a jury would have no discretion to exercise. And in all such cases—whether the judgment be by confession, default or on demurrer—the course (as it was laid down by the Common Law Procedure Act, 1852) is not to issue any writ of inquiry, but to apply for an order of the court or a judge, that the amount which the plaintiff is entitled to recover be ascertained by one of the masters of the court (*k*).

(*i*) It was provided by 3 & 4 Will. 4, c. 42, s. 18, that judgment after a writ of inquiry might be signed and execution issue forthwith, unless the sheriff certified that judgment ought not to be signed until defendant had an opportunity to apply to the court to set aside the execution of the writ; or unless a judge should think fit to stay the judgment.

(*k*) 15 & 16 Vict. c. 76, s. 94. No mention of *writs of inquiry* is made in the rules of procedure annexed to the Judicature Act, 1873.

A *final* judgment is that which is awarded at the end of the action, whether it be determined on a demurrer raised by the defendant, or on verdict, confession, default of appearance or of defence, nonsuit, or *nolle prosequi*. But this distinction is always to be understood, with respect to cases where there has been no verdict,—that if the action be for recovery *of damages*, the final judgment is preceded by an interlocutory judgment and writ of inquiry, or reference to the master thereon, to ascertain the amount of those damages; but if the action be for recovery *of a debt* or liquidated sum of money, then the judgment is final in the first instance (*l*). And we may remark here, that final judgments in the first instance, as upon confession or default of any statement of defence, have been often agreed upon before an action is brought, and constitute a very usual form of security for money; the course being for the debtor to execute a *warrant* to some solicitor named by the creditor, empowering him to sign judgment against the debtor in an action of debt for the specific sum due; though this practice is subject to several restrictive regulations for the prevention of fraud or oppression (*m*).

(*l*) See 15 & 16 Vict. c. 76, s. 93.

(*m*) 3 Bl. Com. 397. The instrument given, is either a *warrant of attorney*, a *cognovit actionem* or a *consent to a judge's order* for judgment against the defendant. The chief difference between them is, that the two latter are given in the course of an action already commenced. The regulations referred to in the text, are now set forth in the Debtors Act, 1869 (32 & 33 Vict. c. 62), ss. 24—28, in substitution for the previous provisions on the same subject chiefly contained in 1 & 2 Vict. c. 110, ss. 9, 10, repealed by 32 & 33 Vict. c. 83. Under these no *warrant of attorney* or *cognovit* shall be of any force unless there be present some solicitor on behalf of the person giving it, expressly named by him, and attending at his request to inform him of the nature and effect of the instrument before the same is executed; which solicitor shall subscribe his name as a witness to the due execution, and thereby declare himself to be solicitor for the party, and state that he subscribes as such. In the case of a "judge's order" it must be filed in court within twenty-one days after it is made, or any judgment or execution thereon will be void.

At common law, all judgments had relation to the first day of the Term in which they were signed, though in point of fact not signed till afterwards (*n*); the Term being considered, for this and some other purposes, as consisting but of one day (*o*). But by the present practice, all judgments, whether interlocutory or final, are entered of record, of the day of the month and year, whether in Term or Vacation, when they were actually signed, and have no relation to any other day (*p*); but it has been competent for the court or a judge to order a judgment to be entered *nunc pro tunc* (*q*).

Upon final judgment, execution may issue against the *goods and chattels* of the debtor (*r*); or against any *lands, tenements, and hereditaments*, of which he himself, or any person in trust for him, shall have been seised or possessed, or over which he shall have any disposing power, exercisable without the assent of any other person, for his own benefit, at the time when the judgment is entered up,

(*n*) See Jeffreson *v.* Morton, 2 Saund. by Wms. 8 k.

(*o*) Vide sup. p. 482—485.

(*p*) Even as early as the time of Charles the second it was provided in favour of *bonâ fide* purchasers for valuable consideration, that, as against *them* judgments should bind the lands of the debtor only from such time as they should be signed, and should not relate to the first day of the term. (29 Car. 2, c. 3, ss. 13—15.)

(*q*) As to judgment *nunc pro tunc*, see Miles *v.* Williams, 9 Q. B. 47; Fishmongers' Company *v.* Robertson, 3 C. B. 970; Freeman *v.* Tranah, 12 C. B. 406; Heathcote *v.* Wing, 11 Exch. 355; Moor *v.* Roberts, 3 C. B. (N. S.) 844.

(*r*) Until a recent period, execution on a judgment might also, in cases above 20*l.*, issue against the *person* of the debtor; who might be arrested and imprisoned under the writ of *capias ad satisfaciendum;* but by the 32 & 33 Vict. c. 62 (the Debtors Act, 1869), it was enacted that no person should thenceforth be arrested or imprisoned for making default in payment of a sum of money (except in a few cases specified in sect. 4 of that Act). But the same statute provides for the commitment to prison of persons who (having the means) refuse or neglect to pay a debt not exceeding 50*l.* due from them in pursuance of any order or judgment,—for a term of six weeks or until payment. (See Hewitson *v.* Sherwin, Law Rep., 10 Eq. Ca. 53.) Such imprisonment may be awarded either in the superior court or by the county court, according to where the judgment or order was obtained. (Vide sup. p. 289.)

or at any time afterwards (*s*). But the operation of judgments on *lands*, as thus generally stated, must be taken in connection with and subject to the following important provisions. First, it is enacted by 23 & 24 Vict. c. 38, s. 1, that, (as regards a *bonâ fide* purchaser for valuable consideration or a mortgagee,) no judgment to be thereafter entered up shall affect any land unless a writ or other due process of execution thereon shall have been issued and registered with the Senior Master of the Common Pleas (*t*). And, secondly, by 27 & 28 Vict. c. 112, s. 2, that no judgment entered up after 29th July, 1864, shall affect any land until it shall have been actually delivered in execution under an elegit or other lawful authority (*u*). By this last statute also, it is provided, that the writ or other process of execution shall be thenceforth registered in the name of the debtor against whom it was obtained, instead of (as previously) in the name of the creditor (*x*). The provisions of this Act were intended to assimilate the effect of judgments on the *land* of the debtor to that which before prevailed with regard to their operation on his *goods and chattels*; and these have been always

(*s*) 1 & 2 Vict. c. 110, s. 11. A judgment against a mortgagee would formerly bind the land mortgaged, even though the mortgage was paid off and the land actually conveyed to a purchaser or another mortgagee; but it was provided by 18 & 19 Vict. c. 15, s. 11, that this should no longer be the case as to future transactions.

(*t*) See also the earlier enactments of 4 & 5 Will. & M. c. 20; 1 & 2 Vict. c. 110, s. 19; 2 & 3 Vict. c. 11; 18 Vict. c. 5: and the following cases, Kemp *v.* Waddington, Law Rep., 1 Q. B. 355; and Gardner *v.* London, Chatham and Dover Railway Co., ib. 2 Ch. App. 385.

(*u*) See Guest *v.* Cowbridge Railway Co., Law Rep., 6 Eq. Ca. 619; Mildred *v.* Austin, ib. 8 Eq. Ca. 220; In re Duke of Newcastle, ib. 700; Hatton *v.* Haywood, 29 L. T. Rep. (N. S.) 385. Prior to this enactment (under 1 & 2 Vict. c. 110, s. 13), a judgment operated as a *charge in equity*, from the time of entering up the same, on all lands whereof at that date the judgment debtor was seised, possessed or interested for any estate whether at law or equity.

(*x*) The creditor may obtain an order for the *sale* of the interest of his debtor, in the land thus delivered. (See In re Bishop's Waltham Railway Co., Law Rep., 2 Ch. App 382.)

bound, as between the parties, from the date or *teste* of the writ of execution—and as against purchasers, from the time of actual seizure under the execution (*y*).

Moreover, by 1 & 2 Vict. c. 110, s. 17, it was provided, that every judgment debt shall carry interest, at the rate of 4*l.* per cent. per annum, from the time of entering up the judgment, until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment (*z*).

Thus much for judgments, to which (as the general rule) *costs* are a necessary appendage;—it being now as well the maxim of ours, as of the civil law, that "*victus victori in expensis condemnandus est*," though the common law did not allow any (*a*). Costs are accordingly taxed (as already remarked) at the same time that the judgment is signed, and form part of its aggregate amount (*b*). But the law respecting them deserves a more particular attention than could conveniently have been bestowed upon it when the subject was before touched upon, and we therefore resume its consideration in this place.

The first statute which directed that costs should be given to the plaintiff in an action at law, was the Statute

(*y*) The law on this subject is more particularly stated, sup. vol. II. pp. 51, 52.

(*z*) See Newton *v.* Grand Junction Railway Company, 16 Mee. & W. 139.

(*a*) Cod. 3, 1, 13. The chief *exceptions* are those where the action should have been brought in a county court (as to which vide sup. p. 287). And also those in which the court withholds costs in the exercise of its discretion under 36 & 37 Vict. c. 66, sched. r. 47; which directs that, subject to the provisions of that Act, the costs of and incident to all proceedings in the High Court shall be *in the discretion of the court.*

(*b*) There are many cases of vexatious proceeding, in which the legislature had formerly provided, that the party in fault should be punished by the payment to his adversary of *double*, or (sometimes) *treble* costs. But by 5 & 6 Vict. c. 97, all such provisions were repealed; and it was enacted, that the adversary should be entitled only to a full and reasonable indemnity, to be taxed by the proper officer.

of Gloucester, 6 Edw. I. c. 1 (*c*). Prior to this Act, indeed, the costs of the proceedings were always considered and included in the amount of damages, in those actions in which damages were given; but because those damages were frequently inadequate to the plaintiff's expenses, the Statute of Gloucester ordered costs *eo nomine* to be also added. But as the general rule no costs were allowed the *defendant* in an action at law, in any shape, till the statutes 23 Hen. VIII. c. 15; 8 Eliz. c. 2; 4 Jac. I. c. 3; 8 & 9 Will. III. c. 11; and 4 Ann. c. 16; and these very properly gave the defendant, if he prevailed, the same costs as the plaintiff would have had in case he had succeeded. But even after these enactments, there still remained several cases in which the law was defective on this subject, both as regards the plaintiff and the defendant. These defects, however, were afterwards remedied by a variety of provisions, and chiefly by the statutes 9 Ann. c. 20; 43 Geo. III. c. 46, s. 4; 1 Will. IV. c. 21; 3 & 4 Will. IV. c. 42, ss. 31—34; 4 & 5 Will. IV. c. 39; 15 & 16 Vict. c. 76, ss. 81, 146, 223; 17 & 18 Vict. c. 125, ss. 42, 44, 57, 67, 93; and 23 & 24 Vict. c. 126, ss. 11, 27, 32. By one of these, it was provided that if a plaintiff instead of taking out execution upon a judgment he has recovered shall bring an action thereon, he shall have no costs of such unless the court or a judge shall otherwise order (*d*). And it was also (among other matters) laid down under these enactments, that though the party who succeeds substantially, should have the general costs of the action; yet his adversary succeeding on any particular issue, whether in law or fact, should be entitled to the costs of the issue on which he is victorious (*e*).

(*c*) 3 Bl. Com. 399. As to the history of costs, see Burgess *v.* Langley, 5 Man. & G. 723, *in notis;* Partridge *v.* Gardner, 4 Exch. 303; Howell *v.* Rodbard, ibid. 309; Bentley *v.* Dawes, 10 Exch. 347; Cannon, *dem.*, Rimington, *ten.*, 12 C. B. 514.

(*d*) 43 Geo. 3, c. 46, s. 4. See Adam *v.* Ready, 6 H. & N. 261.

(*e*) See, in particular, 15 & 16 Vict. c. 76, s. 81. By 3 & 4 Will. 4, c. 42, s. 31, which for the first time provided that *executors* and *admi-*

Moreover, by "The County Courts Act, 1867," in order to prevent the practice of suing in the superior court in matters of small amount, it was provided, that a plaintiff who resorts thereto and recovers a sum not exceeding 20*l.* in an action founded on a contract,—or no more than 10*l.* if founded on tort,—shall have no costs of suit, unless the court or a judge will certify on the record that there was sufficient reason for his taking that course (*e*). It may be further observed that no costs are allowed in a penal action to a plaintiff suing as a common informer, unless they are expressly given by the statute on which he sues; for, as the action itself creates the right, he has no claim to damages; and by the general rule of law, where there are no damages, there can be no costs (*f*).

With respect to pauper suitors, that is, such as will swear themselves not worth 5*l.* in the world, except their wearing apparel and the matter in question in the cause (*g*),—it is to be observed, that they are by statute 11 Hen. VII. c. 12, and 23 Hen. VIII. c. 15, exempted from the payment of court fees; and they are entitled to have counsel and solicitor assigned to them by the court without fee; and are moreover excused from paying costs when unsuccessful, though it is said they shall suffer other punishment at the discretion of the judges (*h*). And

nistrators, when *plaintiffs*, should be liable to costs, power is given to the court or a judge to exempt them from such liability by special order in any particular case. (See Redmayne *v.* Moon, 25 L. J., Q. B. 311.)

(*e*) 30 & 31 Vict. c. 142, s. 5. See Marshall *v.* Martin, Law Rep., 5 Q. B. 239.

(*f*) See College of Physicians *v.* Harrison, 9 B. & C. 524.

(*g*) See 3 Bl. Com. 400.

(*h*) Bl. Com. ubi sup. These Acts have no application to the case of a *defendant*, whose poverty, however extreme, will not avail him in the matter of costs. Blackstone says (vol. iii. p. 400) that it was formerly usual to give pauper plaintiffs, if non-suited, their election, *either to be whipped or pay their costs*. But in modern practice no instance of the award of *any* punishment, in such cases, has occurred. As to suing *in formâ pauperis*, see Pratt *v.* Delarue, 10 Mee. & W. 512; Doe *v.* Owens, ibid. 514; Hall *v.* Ive, 7 Man. & G. 1001; Reg. Gen. Hil. T. 1853, rr. 121, 122.

a person thus suing *in formâ pauperis* may recover costs, though he pays none; for the counsel and clerks are bound to give their labour to *him*, but not to his antagonists (*i*).

It is to be observed, that in the Court of Chancery the costs to be given to either party have never been held to be a point of right; but merely discretionary according to the circumstances of the case, as they appear more or less favourable to the party vanquished (*k*). And it forms one of the rules of procedure annexed to the Judicature Act, 1873, that, subject to the provisions of that Act, the costs of and incident to all proceedings in the High Court thereby established shall be in the discretion of the court (*l*); and no order as to costs left by law to the discretion of the court shall, except by leave of the court or judge making the order, be subject to any appeal (*m*).

After judgment,—unless the party condemned takes some course to be relieved from its effect,—he will be liable to execution (*n*). But he may obtain such relief, where there is ground for it, by—

V. *Appeal.* Proceedings by way of appeal have been substituted by the Judicature Act, 1873, for the proceed-

(*i*) 3 Bl. Com. 401.

(*k*) 3 Bl. Com. 452; 17 Ric. 2, c. 6; 15 Hen. 6, c. 4. See Seton on Decrees, p. 90, 3rd ed.

(*l*) 36 & 37 Vict. c. 66, Sched., r. 47. But this is not to deprive a trustee, mortgagee or other person of any right to costs out of a particular estate or fund "to which he would be entitled according to the rules hitherto acted upon in Courts of equity." (Ibid.)

(*m*) Sect. 49.

(*n*) Blackstone (vol. iii. pp. 402, 405) speaks of a writ of *attaint*, a writ of *deceit*, and a writ of *audita querela*, among the methods of relief from a judgment. But the two first of these are now abolished, and the last may be said to be nearly obsolete. The writ of attaint we have before had occasion to notice, vide sup. p. 561, n. (*k*). The writ of deceit was an action brought in the Common Pleas to reverse a judgment obtained in a *real* action, by fraud or collusion between the parties, to the prejudice of a right of a third person. It was abolished by 3 & 4 Will. 4, c. 27, s. 36. The *audita querela* (as to the nature of which, see also Holmes *v.* Pemberton, 1 E. & E. 367), is a writ that lies for a defendant against whom judgment has been given,—but who is entitled to

ings *in error* which have been hitherto in use (*o*). Proceedings by way of error were always for a supposed mistake in some court of record; for to amend errors in a court *not* of record, a writ of *false judgment* lay (*p*). Error was either in some matter of *fact* or in some matter of *law*. The errors in *fact* which gave rise to a proceeding of this kind were not numerous, but among them were the following:—that the defendant, being an infant, appeared by attorney, and not by guardian; or that the plaintiff or defendant was a married woman when the action commenced (*q*). But the most usual species of the proceeding by way of error, was that which was founded upon some supposed mistake of *law*, apparent on the face of the record—such as might have formed a sufficient ground, at the proper time, for a demurrer, a motion in arrest of judgment, or a motion for a judgment *non obstante veredicto* (*r*).

Formerly the suitors were much perplexed by proceedings in error instituted upon very slight and trivial grounds, as mis-spellings, and other mistakes of the clerks.

be relieved upon some matter of discharge which has happened since the judgment; as if the plaintiff has given a general release, or if the defendant has since paid the debt. It is a writ stating that the complaint of the defendant has been heard, *audita querela defendentis;* setting forth the matter of complaint, and enjoining the court to call the parties before them, and cause justice to be done. But the indulgence now shown by the courts, in granting relief upon *motion*, has long since almost superseded the remedy by *audita querela*. (See 2 Saund. 137 e.)

(*o*) Proceedings in error used, at one period, to begin by a *writ* sued out of the common law side of the Court of Chancery, addressed to the chief justice of the court in which the judgment was given, and commanding him to send a transcript of the record to the Court of Error. But by 15 & 16 Vict. c. 76, s. 148, this writ was in almost every case, (see Arding *v.* Holmer, 26 L. J., Exch. 72,) dispensed with.

(*p*) As to the writ of *false judgment*, see Overton *v.* Swettenham, 3 Bing. N. C. 786; Crooks *v.* Longden, 5 Bing. N. C. 410.

(*q*) As to error in fact, see King *v.* Jones, Ld. Raym. 1525; Bird *v.* Pegg, 5 B. & Ald. 418; Irwin *v.* Grey, Law Rep., 2 App. Cas. 20; Metropolitan Railway Company *v.* Wilson, ib. 6 C. P. 376.

(*r*) Vide sup. p. 564.

For these in general were held sufficient, unless amended, to vitiate the proceedings, even after judgment: and were at the same time incapable of amendment, after judgment was actually recorded, unless within the very Term in which the act so recorded was done; for during the term the record was held to be in the breast of the court, but afterwards it admitted of no alteration (*s*). But this strictness was relaxed by many modern statutes; and it was provided, that no judgment should be reversed for any imperfection, omission, or defect of form (*t*). And, further, that the superior courts, or any judge thereof, or any judge sitting at *nisi prius*, should at all times make all such amendments in any proceeding "as may be necessary for the purpose of determining, in the existing suit, the real question in controversy between the parties;" and might do this, either with or without costs, and upon such terms as to the court or judge may seem fit (*u*). It was also enacted, that no judgment should be reversed for any error, unless the proceeding for the purpose were commenced and prosecuted with effect, within *six years* after such judgment is signed or entered of record, or within six years after the removal of any disability under which the party aggrieved might have laboured at the

(*s*) Blackstone (vol. iii. pp. 408, 411) attributes this strictness partly to a "narrowness of thinking," on the part of the judges, and partly to a "real shallowness, but affected timidity," engendered by some severity shown in the reigns of Edward the first and Edward the third, with regard to the offence of surreptitiously erasing and altering records,—particularly the inflicting of rigorous forfeitures and punishments on most of the judges, for alleged malpractice in this particular.

(*t*) 15 & 16 Vict. c. 76, s. 50. Such defects were, even before this enactment, for the most part cured, after judgment by the statutes of *jeofail and amendment* before mentioned; vide sup. p. 563.

(*u*) Sect. 222; 17 & 18 Vict. c. 125, s. 96; 23 & 24 Vict. c. 126, s. 36. Even before these provisions, amendments had latterly been often allowed in case of material mistake, upon condition of paying costs; and this, though the application to amend had not been made until after the judgment had been recorded, and the Term had passed, or even after error brought. (See Richardson *v.* Mellish, 1 Clark & Fin. 224.)

time his title to bring error accrued (*x*). And further, that execution should not be stayed by proceedings in error, brought by the defendant in the action, on any judgment, without the special order of the court or a judge,—unless such defendant entered into a recognizance, with sufficient sureties, in double the sum adjudged to be recovered, to prosecute the proceedings in error with effect, and also to pay all money and costs which might ultimately become due from him, either on the judgment itself, or the proceedings for its reversal (*y*). But, until default was made in entering into such recognizance, proceedings in error were generally a stay of execution (*z*).

The Rules of Procedure annexed to the Judicature Act, 1873, after abolishing proceedings in error altogether (*a*), proceed to enact, that all appeals from the High Court of Justice to the Court of Appeal shall be by way of *re-hearing*, and shall be brought on by motion in a summary way, without petition, case, or other formal proceedings other than a notice of motion (*b*)—such notice being served upon all parties directly affected by the appeal, and on them alone; though the Court of Appeal may direct notice of the appeal to be served on any person, whether party or otherwise to the action or other proceeding, and in the meantime may postpone or adjourn the hearing of the appeal upon such terms as shall be just (*c*).

It is also provided by the same Rules, that the Court of Appeal shall have all the powers and duties, as to amendment and otherwise, of the court of first instance—with full discretionary power to receive further evidence upon questions of fact, and to give such judgment, decree or

(*x*) 15 & 16 Vict. c. 76, s. 146.

(*y*) Sect. 151. By 22 Vict. c. 16, s. 5, the provisions contained in 4 W. & M. c. 4, as to taking *special* bail, were extended to bail *in error*.

(*z*) See 15 & 16 Vict. c. 76, ss. 150, 158; Semple *v.* Turner, 6 Mee. & W. 152.

(*a*) 36 & 37 Vict. c. 66, sched. r. 49.

(*b*) Rule 50.

(*c*) Rule 51.

order as ought to have been made in the High Court (*d*) —that (except by special leave) no appeal from any interlocutory order shall be brought after the expiration of twenty-one days, or any other appeal after the expiration of one year (*e*)—and that no appeal shall operate as a stay of execution or of proceedings under the decision appealed from, except so far as the court appealed from, or any judge thereof, or the Court of Appeal, may direct (*f*).

Some other provisions of the Judicature Act, 1873, in reference to matters of appeal may here be noticed. Thus: 1. Although, as the general rule, every appeal is to be determined, either by the whole court, or by a divisional court consisting of not less than three judges (*g*), yet, in any cause or matter pending before the Court of Appeal, any direction *incidental* thereto may be given by a single judge of that court (*h*); who may also, during vacation, make such "interim orders" as he pleases, to prevent prejudice to the claims of any parties (*i*). 2. No judge shall sit at the hearing of an appeal from any judgment or order made by himself, or any divisional court of the High Court of which he was a member (*j*). And 3. At least one divisional court of the Court of Appeal shall sit throughout the year (except during vacations), and shall be composed (so far as may be found practicable) of judges who are also members of the Privy Council (*k*).

VI. If the regular judgment of the court, after the decision of the action, be not suspended or reversed by one

(*d*) 36 & 37 Vict. c. 66, sched. r. 52.

(*e*) Rule 57.

(*f*) Rule 58. The rules also contain provisions with regard to *cross* appeal, and the mode of bringing the evidence in the court below before the Court of Appeal (rr. 53—56).

(*g*) 36 & 37 Vict. c. 66, s. 53.

(*h*) Sect. 52.

(*i*) Ibid.

(*j*) Sect. 54. By sect. 51, any judge of the Court of Appeal may, on the request of the Lord Chancellor, sit and act as a judge of the High Court.

(*k*) Sect. 55.

or other of the methods mentioned in this chapter, the next and last step is the *execution* of that judgment, or putting the sentence of the law in force. This is performed by different writs of execution. In the ordinary action, seeking redress for some legal injury, the judgment is in general for recovery of *money* only, (either by way of debt or damages,) and not for the recovery of any specific chattel;—there being, however, an exception to this in the case of *detinue*, in which the judgment is for recovery of the goods themselves which are detained, or the value thereof, with damages and costs. In detinue, accordingly, there has been a special writ of execution in use, called a *distringas*, to compel the defendant to deliver the goods by repeated distresses of his chattels (*l*); or else a *scire facias* has issued against any third person in whose hands they may happen to be, to show cause why they should not be delivered. While if the defendant still continues obstinate, then, (if there has been no verdict assessing the value, but the judgment hath been by default, or on demurrer,) the sheriff has been directed to hold an inquest, to ascertain the value of the goods and the plaintiff's damages, to be levied on the goods of the defendant. And in recognition of this practice of *distringas*, it was expressly provided by the Common Law Procedure Act, 1854, that in an action for the detention of a chattel, where there has been a verdict assessing its value, the court or judge shall have power if they or he see fit, upon the application of the plaintiff, to order that execution shall issue for the return of the chattel detained,—without giving the defendant the option of retaining such chattel, upon paying the value assessed. And that if it cannot be found, and the court or judge do not otherwise order, the sheriff shall distrain the defendant by all his lands and chattels in the bailiwick, until he shall render the chattel,—or, at the option of the plaintiff, shall cause to be made of the de-

(*l*) 1 Roll. Ab. 737; Rast. Ent. 215.

fendant's goods the assessed value of the chattel, with damages, costs, and interest besides (*m*).

But when, as is usually the case, the judgment is for the recovery of money only, the judgment creditor may resort to one of the following writs of execution:

1. A *fieri facias*.—This is an execution against the goods and chattels of the party against whom the judgment is recovered, and it is so from the words of the writ, whereby the sheriff is commanded *quod fieri facias de bonis*, that he cause to be made of the goods and chattels of the party, the amount of the judgment debt. From this writ neither peers, nor any other privileged persons, are exempt; and it lies, also, against executors or administrators, with regard to the goods of the deceased (*n*). The sheriff may not break open any outer door to execute the writ: but must enter peaceably (*o*); and he may then break open any inner door in order to take the goods (*p*). Nor can he execute the writ on a Sunday (*q*), or within the precincts of a royal residence (*r*). But he may sell the goods and chattels of the party against whom the writ is issued (*s*), including even his estate for years, (which is a chattel real,) or his growing crops (which are in the nature of personalty), till he has raised enough to satisfy the judgment (*t*). This, however, is subject to certain restrictions, which the law has deemed it reasonable to impose for the protection of landlords. For, first by 8 Anne, c. 14, the sheriff cannot lawfully sell goods lying upon any premises demised

(*m*) 17 & 18 Vict. c. 125, s. 78. See Chilton *v.* Carrington, 15 C. B. 730.

(*n*) 3 Bl. Com. 417. As to taking in execution goods of which the defendant is merely a *trustee*, see Fenwick *v.* Laycock, 2 Q. B. 108.

(*o*) 5 Rep. 92.

(*p*) Palm. 54; Pugh *v.* Griffiths, 7 A. & E 827; Morrish *v.* Murray, 13 Mee. & W. 52.

(*q*) Arch. Pr. by Chitty, 548, 8th ed.

(*r*) Att.-Gen. *v.* Dakin, Law Rep., 3 Exch. 288; 4 Eng. & Ir. App. Ca. 338.

(*s*) The sale may be either by auction or private treaty; and it is not unusual for the sheriff to hand over the goods to the execution creditor himself at a fair valuation. (See Herniman *v.* Bowker, 25 L. Exch. 69.)

(*t*) 3 Bl. Com. 417.

to a tenant, unless the landlord be first paid his rent due before the execution, to the extent, that is to say, of one year's arrears (*u*). Secondly, by 56 Geo. III. c. 50, no sheriff shall carry off, or sell for the purpose of being carried off the premises, any straw, hay, manure or the like from any lands let to farm, in any case where by the covenants or agreements in the lease the carrying off the same is prohibited between landlord and tenant,—but such produce may nevertheless be lawfully sold to any person who will agree, in writing, to use and expend the same upon the lands, according to the obligation of the tenant (*x*). And lastly, by 14 & 15 Vict. c. 25, s. 2, if growing crops are seized and sold on a *fi. fa.* or other writ of execution by the sheriff, they shall still, so long as they remain on the lands (and where there is no other sufficient distress), be liable to be distrained for rent becoming due from the tenant after such seizure and sale. It is to be noticed that, at common law, no personal chattel could be taken under this writ that was not in its nature properly capable both of manual seizure and sale. But now by 1 & 2 Vict. c. 110, s. 12, it is enacted, that the sheriff may upon a *fieri facias*, (whether sued out of a superior or inferior court,) take any *money, bank notes, bills of exchange* or other *securities for money*, belonging to the party against whom the writ

(*u*) See Rissley *v.* Ryle, 11 Mee. & W. 17; Smallman *v.* Pollard, 6 Man. & G. 1001; Cocker *v.* Musgrove and another, 9 Q. B. 223; White *v.* Binstead, 13 C. B. 304; Wollaston *v.* Stafford, 15 C. B. 278. It is however provided, by 7 & 8 Vict. c. 96, s. 67, that no landlord of any tenement let at a *weekly* rent shall have any claim or lien upon any goods taken in execution under the process of any court of law, for more than *four weeks'* arrears of rent. And, in like manner, in case of a tenement let for any other term *less than a year*, the landlord shall not have any such claim or lien for more than the arrears of rent accruing during *four* such terms or times of payment. (See, in reference to these provisions, Wharton *v.* Naylor, 12 Q. B. 673.) See also in reference to the landlord's claim for rent upon an execution, under warrant from a *county court*, 19 & 20 Vict. c. 108, s. 75.

(*x*) See Wilmot *v.* Rose, 3 Ell. & Bl. 563.

is sued out (*y*); and may also sue upon such bills or securities in his own name, paying over the money to be recovered thereon to the creditor. It is to be observed, that if the sheriff is unable to sell the goods at a reasonable price, he may make his return upon the writ, that they remain in his hands for want of buyers, upon which the party suing out the execution may proceed to take out a writ of *venditioni exponas*; and under this latter writ, the sheriff is bound to sell them for the best price, however inadequate, that can be obtained (*z*).

2. Another species of execution is by writ of *levari facias*; which affects a man's goods and the *profits* of his lands, by commanding the sheriff to levy the judgment debt on the lands and goods of the party against whom it issued, whereby the sheriff may seize all his goods and receive the rents and profits of his lands, till satisfaction be made (*a*). No use, however, has in modern practice been made of this writ against ordinary judgment debtors, the remedy by the writ next to be mentioned, which takes possession of the lands themselves, being much more effectual. But of this species is a writ of execution, proper only against the clergy, which is given when the sheriff, upon a common writ of *fieri facias*, returns *nulla bona*, and that the party is a beneficed clerk, not having any lay fee (*b*). In this case, inasmuch as *bona ecclesiastica* are not to be touched by lay hands, a writ goes to the bishop of the diocese, in the nature of a *levari facias* (*c*), commanding him to enter into the benefice, and take and sequester the same into his possession; and hold the same until he shall have levied the amount of the judgment out of the rents, tithes, and profits thereof (*d*). And thereupon the bishop sends out a *sequestration* of the profits of the

(*y*) See Collingridge *v.* Paxton, 11 C. B. 683.

(*z*) Keightley *v.* Birch, 3 Camp. 521.

(*a*) Finch, L. 471.

(*b*) 3 Bl. Com. 418.

(*c*) Reg. Orig. 300; Judic. 22; 2 Inst. 4.

(*d*) Harding *v.* Hall, 10 Mee. & W. 42.

clerk's benefice: directing the churchwardens to collect such profits, and, after providing thereout for the offices of the church, to pay over the surplus to the judgment creditor, until the full sum due to him be raised (*e*).

3. A third species of execution is by writ of *elegit*; which was given by the Statute of Westminster the second, 13 Edw. I. c. 18 (*f*). Before that statute, a man could only have the *profits* of land in satisfaction of his judgment, but not the possession of the lands themselves; which was a natural consequence of the feudal principles, as established in their original form, which limited in a very strict manner even the right of *voluntary* assignment (*g*). And when the restriction of alienation began to wear away, the consequence still continued; and as the creditor could not take possession of land, but only levy the growing profits, it followed that if the defendant aliened his lands, the plaintiff was ousted of his remedy. The statute (13 Edw. I. c. 18), therefore, granted this writ, —called an *elegit*, because it is in the choice of the judgment creditor, whether he will sue out this writ or a *fi. fa.* —by which the judgment debtor's goods and chattels are not sold, but only appraised: and all of them, (except oxen and beasts of the plough,) are delivered to the judgment creditor, at such reasonable appraisement and price in satisfaction of his debt (*h*). If the goods should prove not to be sufficient, then—according to the law as it stood from the time of the passing of the Statute of Westminster

(*e*) As to a sequestration, vide sup. vol. II. p. 662; Morris *v.* Ogden, Law. Rep., 4 C. P. 687.

(*f*) As to the nature of this writ, see Sherwood *v.* Clark, 15 Mee. & W. 764; Carter *v.* Hughes, 2 H. & N. 714.

(*g*) Vide sup. vol. I. pp. 467—470. But it appears by *Magna Charta*, c. 8, that it was allowed, by the common law, for the *king* to take possession of the lands till his debt was paid. For he being the grand superior, and ultimate proprietor of all landed estates, might seize the lands into his own hands, if anything was owing from the vassal; and could not be said to be defrauded of his services when the ouster of the vassal proceeded from his own command. (3 Bl. Com. 419.)

(*h*) 3 Bl. Com. 418.

until the commencement of the present reign,—the *moiety* of the lands of freehold tenure which the judgment debtor had at the time of the judgment given, whether held in his own name or by any other in trust for him, were also to be delivered to the judgment creditor,—to hold till out of the rents and profits thereof the debt was levied, or till the judgment debtor's interest therein was expired (*i*). But by 1 & 2 Vict. c. 110, s. 11, it was provided, that upon an elegit the sheriff shall now deliver execution of *all* lands, tenements, and hereditaments, (including those of copyhold or customary tenure,) which the judgment debtor, or any person in trust for him, shall have been seised or possessed of at the time of entering up the judgment, or at any time afterwards; or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any *disposing power* which he may, without the assent of any other person, exercise for his own benefit (*k*). And by 27 & 28 Vict. c. 112, s. 4, every creditor to whom his debtor's land shall have been actually delivered in execution under a judgment, and whose writ or other process of execution shall be duly registered, may, during the time that such registry shall continue in force, obtain an order (upon petition in a summary way to an equity judge) for the sale of his debtor's interest in such land (*l*).

Besides these writs of execution, the judgment creditor was enabled, by the 1 & 2 Vict. c. 110, s. 14, and

(*i*) 2 Inst. 395; and see 29 Car. 2, c. 3.

(*k*) An elegit is always *returned* by the sheriff; (that is, it is filed in court after execution, showing what has been done thereon;) and in this respect it differs from a *fi. fa.*; which is not usually returned by the sheriff, unless he is *ruled* to do so. When upon an *elegit*, it is returned that land has been delivered to the plaintiff,—he is entitled at once, (subject to the estates of any parties which commenced before the judgment,) to enter such land, peaceably; or, if necessary, to recover it by ejectment, on which issues the writ of *habere facias possessionem*: after which entry or writ he is *tenant by elegit*; as to whose estate, vide sup. vol. I. p. 310.

(*l*) Vide sup. p. 573.

3 & 4 Vict. c. 82, to resort to other modes of proceeding, to enforce payment out of a species of property which these writs could not in their nature conveniently reach. For, on the application of any creditor who has entered up judgment, a judge may, by these statutes, order that the property of the debtor in government stock, or in the stock of any public company in England, corporate or otherwise, shall (whether standing in his own name or the name of any person in trust for him) stand *charged* with the payment of the amount for which judgment shall have been recovered, with interest; so as to give the judgment creditor the same remedies as if the charge had been made in his favour by the judgment debtor. But this is subject to a proviso, that no proceedings shall be taken on such judge's order till after *six calendar months* from its date (*m*). And in further aid of the judgment creditor, it was also provided by the Common Law Procedure Act, 1854 (*n*), that he might apply for a rule or order to have the judgment debtor orally examined as to the debts owing to him by any third person; and make application for an order that all debts (*o*), found to be due from any third person, (called the *garnishee*,) to the judgment debtor, shall be *attached* to answer the judgment debt;—the service of which order shall bind such debts in the garnishee's hands (*p*). The same Act also provides, that if the gar-

(*m*) As to these provisions, see Brown *v.* Bamford, 9 Mee. & W. 42; Churchill *v.* Bank of England, 11 Mee. & W. 323; Rogers *v.* Holloway, 5 Man. & G. 292; Witham *v.* Lynch, 1 Exch. 391; Robinson *v.* Burbidge, 1 L. M. & P. 94; Graham *v.* Connell, ibid. 438; Watts *v.* Porter, 3 Ell. & Bl. 743; Baker *v.* Tynte, 2 Ell. & Ell. 897; Dixon *v.* Wrench, Law Rep., 4 Exch. 154; Haly *v.* Barry, ib. 3 Ch. App. 452.

(*n*) 17 & 18 Vict. c. 125, ss. 60—67. See Innes *v.* East India Company, 17 C. B. 351; Lockwood *v.* Nash, 18 C. B. 536; Mason *v.* Muggeridge, ibid. 642; Hirsch *v.* Coates, ibid. 757; Holmes *v.* Tutton, 5 Ell. & Bl. 65; Jones *v.* Jenner, 25 L. J., Exch. 319; Johnson *v.* Diamond, 11 Exch. 431; Dresser *v.* Johns, 6 C. B. (N. S.) 429. Further provisions as to attachment of debts are made by 23 & 24 Vict. c. 126, ss. 28—31.

(*o*) See Re Paice, Law Rep., 4 C. P. 155; Horsley *v.* Cox, ib. 4 Ch. App. 92.

(*p*) A somewhat similar proceed-

nishee fails to appear upon summons to show cause why he should not pay the judgment creditor the debts attached, or so much as will suffice to pay the judgment debt,—or if, on appearance, he fails to make such payment forthwith, and yet does not dispute the debt alleged to be due from him, the judge may order execution against him for the amount (*q*); and that, if on the other hand he does dispute his liability, the judge may order that the judgment creditor be at liberty to proceed against him by a writ of the same nature as the *writ of revivor*, to which we are about presently to advert.

These are the methods which the law of England allows for the execution of judgments in their ordinary course (*r*). And when the demand of the judgment creditor is satisfied, either by the voluntary payment of the debtor, or by this compulsory process or otherwise, *satisfaction* ought to be *entered on record* (*s*),—to the end that the debtor may not be liable to be hereafter harassed a second time on the same account.

And here our summary account of an action is brought to its proper close. But before we conclude it notice may be taken of certain proceedings which are sometimes incidental to, or follow upon, an action.

ing has been immemorially used in the cities of London and Bristol, under the name of *foreign attachment*, as to which see Wadsworth *v.* Queen of Spain, 17 Q. B. 171; Bastow *v.* Gant, 21 L. J., N. S. (Q. B.) 377; Cox *v.* Lord Mayor of London, Law Rep., 1 H. L. 239. See, also, The Mayor's Court of London Procedure Act, 1857 (20 & 21 Vict. c. clvii.), ss. 5, 18, 47, and 32 & 33 Vict. c. 62, s. 29.

(*q*) As to the abolishment of the practice, in inferior courts, of attaching *wages*, see 33 & 34 Vict. c. 30.

(*r*) 3 Bl. Com. 421. Until the year 1869 there was also in common use the execution writ of *capias ad satisfaciendum*, under which the person of the judgment debtor was taken instead of his property till he made satisfaction for the debt, damages and costs; as to which writ, vide sup. p. 572, n. (*r*).

(*s*) As to entry of satisfaction on the roll, and acknowledgment thereof, see 23 & 24 Vict. c. 115, s. 2; 30 & 31 Vict. c. 47; Lambert *v.* Parnell, 15 L. J. (Q. B.) 55; and Catlin *v.* Kernot, 3 C. B. (N. S.) 796.

I. *The motion by way of interpleader*; or, as it may be otherwise called, motion for relief from adverse claims. It often happens that a man finds himself exposed to the adverse claims of two opposite parties each requiring him to pay a certain sum of money, or to deliver certain goods; and that he is unable to comply safely with the requisition of either, because a reasonable doubt exists to which of them the property in truth belongs. Formerly, a person so circumstanced had no means of relief except by instituting in Chancery a proceeding called a bill of interpleader, which was attended with considerable expense and delay. But by 1 & 2 Will. IV. c. 53 (*t*) it was provided, that,—upon application made on behalf of the defendant in an action of promises, debt, detinue, or trover, showing that the defendant claims no interest in the subject-matter of the suit; but that the right thereto is claimed by, or supposed to belong to, some third party (who has sued, or is expected to sue, for the same), and that the defendant does not in any manner collude with such third party, but is ready to bring into court, or to pay or dispose of the subject-matter of the action in such manner as he may be directed,—it shall be lawful for the court or a judge to order such third party to appear, and to state the nature and particulars of his claim, and either maintain or relinquish the same; and if he maintains it, to make himself defendant in the action already commenced, or otherwise as the case may require. Or, with the consent of the plaintiff and such third party (*u*), the court or a judge may dispose of the question between them in a summary manner (*x*).

(*t*) See also 1 & 2 Vict. c. 45, s. 2, and 23 & 24 Vict. c. 126, ss. 12—18.

(*u*) By 23 & 24 Vict. c. 126, s. 14, no *consent* is necessary where the court or judge is of opinion that from the smallness of the amount in dispute, or of the value of the goods seized, it is desirable and right to dispose of the matter summarily.

(*x*) By 1 & 2 Will. 4, c. 58, s. 6, a similar protection is afforded to *sheriffs* and other officers, who, under the process of the court, are called upon to seize the goods of any person; and are afterwards sued, or

II. The *writ of revivor* is ancillary to the judgment in an action: resort being had to it when the circumstances are such that the law no longer allows the judgment to be enforced by a writ of execution as of course; but deems it reasonable to summon the party charged into court, in order to give him an opportunity of being heard before execution issues. Formerly, the writ used for this purpose was a *scire facias*; which, in like manner as a writ of execution, was directed to the sheriff; and it was by him that the defendant was summoned. But in lieu of this, a writ of revivor, (being indeed substantially the same thing, except as regards the sheriff's intervention,) was substituted by the Common Law Procedure Act, 1852 (*y*); which also provides that this latter writ shall be directed to the defendant himself, and proceeded upon in the same manner as a writ of summons in an ordinary action (*z*).

The circumstances under which a writ of revivor issues, are of a kind connected either with lapse of time or change of parties.

1. As to lapse of time. It was the rule of the common law that all writs of execution must be sued out within a year and a day after the judgment is entered (*a*); for otherwise a presumption was deemed to arise that the judgment was satisfied. But after the year and day, the claimant was still allowed (originally by 13 Edw. I. c. 45) to issue a *scire facias*, calling on the defendant to show cause why execution should not issue. This period of a year and a day was extended by the Common Law Procedure Act, 1852, to six years; and after the expiration of that time, execution is not suffered to issue as

find themselves in danger of being sued, by some third party claiming property in the same goods. And as to interpleader in county and other inferior courts, see 7 & 8 Vict. c. 96, s. 28; 9 & 10 Vict. c. 95, s. 118; 19 & 20 Vict. c. 108, s. 68; Rules and Orders, 1867, rr. 174—180, Sched. of Forms, No. 79—95; 35 & 36 Vict. c. 86, s. 2.

(*y*) 15 & 16 Vict. c. 76, s. 129.

(*z*) Sect. 131.

(*a*) 3 Bl. Com. 421.

of course (*b*). But the party desiring to have execution after such six years, was by that statute enabled to apply for leave to enter a *suggestion* on the roll, to the effect that it manifestly appears to the court that he is entitled to execution; and such suggestion is allowed and execution issued accordingly, if the right shall appear manifest after hearing both parties (*c*). In cases where no such suggestion can be supported, the applicant must have recourse to his writ of revivor, or to an action on the judgment (*d*). A writ of revivor, if the judgment be less than ten years old, issues as a matter of course; if more than ten years old, it is obtained *ex parte* on a rule of court or judge's order; if more than fifteen, then only after a rule to show cause (*e*).

2. As to change of parties (*f*). This may occur, first, in the case of *death*. And here the rule formerly was, that if either plaintiff or defendant died before final judgment, the action would abate; and that if either died after the judgment and before it was satisfied, a *scire facias* by or against the representatives of the party deceased (as the case might be) was requisite in order to enforce the judgment. But by the Common Law Procedure Act, 1852 (in extension of some prior enactments on this subject), it was enacted, that the death of a plaintiff or defendant shall not cause the action to abate (*g*); but that the proceedings, (supposing the right of action to survive,) shall be continued by or against, the proper party or parties (*h*); and a similar provision is contained in the Rules of Procedure annexed to the Judicature Act,

(*b*) 15 & 16 Vict. c. 76, s. 128.

(*c*) Sect. 129.

(*d*) Sect. 130.

(*e*) Sect. 134. No reference to this subject is made in the Rules of Procedure annexed to the Judicature Act, 1873.

(*f*) See Underhill *v.* Devereux, 2 Saund. by Wms. 72 b, g; Bosanquet *v.* Ransford, 11 A. & E. 520; Whittenbury *v.* Law, 6 Bing. N. C. 345.

(*g*) See the earlier enactments on this subject contained in 17 Car. 2, c. 17, and 8 & 9 Will. 3, c. 11

(*h*) 15 & 16 Vict. c. 76, s. 135. And see 17 & 18 Vict. c. 125, s. 92.

1873 (*i*). Secondly, a change of parties may arise in the case of *marriage*. And where a female plaintiff or defendant married before judgment was obtained, the action would formerly in general abate (*k*); and if the marriage was after judgment and before execution, a *scire facias*, at suit of or against the husband and wife, (as the case might be,) was requisite in order to enforce the judgment (*l*). But by the 15 & 16 Vict. c. 76, the action was directed no longer to abate, but be continued to judgment. And the judgment and execution against a female defendant, under such circumstances, might either be against her alone, or (by suggestion or writ of revivor pursuant to that Act) against the husband and wife jointly. Or, if the judgment were in favour of a female plaintiff so circumstanced, execution might be issued by authority of the husband, and without any suggestion or writ of revivor (*m*). In the Rules of Procedure annexed to the Judicature Act, 1873, there is a general provision that an action shall not become abated by the marriage of any of the parties if the action survive or continue, but that the husband may be made party to the action (*n*). Thirdly, a writ of revivor has hitherto been sometimes necessary in the case of *bankruptcy*. For where a plaintiff became bankrupt after he had obtained judgment and before execution, it was formerly requisite that a *scire facias* should issue before execution could be obtained (*o*). But under the 15 & 16 Vict. c. 76, the course of proceeding directed, was either to sue out a writ of revivor, or to apply for leave to enter a suggestion of the kind already described (*p*); and the Rule of Procedure above mentioned provides, also, that the bankruptcy of any of the parties

(*i*) 36 & 37 Vict. c. 66, sched. r. 17.

(*k*) Walker v. Goalin, 11 Mee. & W. 78.

(*l*) Underhill v. Devereux, 2 Saund. by Wms. 72 k.

(*m*) 15 & 16 Vict. c. 76, s. 141.

(*n*) 36 & 37 Vict. c. 66, sched. r. 17.

(*o*) Winter v. Kretchman, 2 T. R. 45.

(*p*) 15 & 16 Vict. c. 76, s. 129.

shall not abate the action; but that his *trustee* may be made a party thereto, by the order of the court or a judge (*q*).

III. As to the writ of *scire facias*, it has been used both as an independent and original proceeding (*r*), and as supplementary to an action—as for restitution after a reversal on appeal (*s*). But in reference to this last species of *scire facias*, the Common Law Procedure Act, 1852, contained a provision, that the writ should be proceeded upon in like manner as the writ of revivor established by that Act (*t*). We will only add, on this subject, that it was a settled rule as to a supplementary *scire facias*, (and the same rule would, it is presumed, apply to a writ of revivor, should such writ be prescribed under the Judicature Act, 1873,) that the defendant shall never be allowed to plead therein any matter which he had an opportunity of pleading originally in the action (*u*). For the object of the proceeding is not to afford him the means of bringing the original judgment into question; but of showing, if he can, that some matter has occurred, since the judgment was given, which entitles him to be relieved from the execution.

IV. Among other incidents to an action, it may here be noticed, that it forms one of the Rules of Procedure annexed to the Judicature Act, 1873, that when by any contract a *primâ facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the court or judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that

(*q*) 36 & 37 Vict. c. 66, sched. r. 17.

(*r*) Among these is the case of *scire facias* for repealing a patent; as to which, see 12 & 13 Vict. c. 109, s. 29; 15 & 16 Vict. c. 83, s. 15; sup. vol. II. p. 33.

(*s*) See 15 & 16 Vict. c. 76, s. 132.

(*t*) Sect. 132.

(*u*) Underhill *v.* Devereux, 2 Saund. by Wms. 72 t. And see Fowler *v.* Rickerby, 2 Man. & G. 760.

the amount in dispute be brought into court, or otherwise secured (*x*). And also that upon the application of any party to an action, and upon such terms as may seem just, the court or judge may make any order for the detention, preservation or inspection of any property being the subject of such action; and may authorize any persons to enter upon or into any land or building in the possession of any party to such action; and for all or any of the purposes aforesaid may authorize any samples to be taken or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full information or evidence (*y*).

The same Act makes it lawful for the court or a judge, on the application of any party to any action, to make an order for the sale, by such person or persons as shall be named in such order, and in such manner and on such terms as to the court or judge may seem desirable, of any goods, wares, or merchandize which may be of a perishable nature, or likely to injure from keeping, or which for other just and sufficient reason it may be desirable to have sold at once (*z*).

In the above account of the proceedings in an action, the course which has been hitherto pursued in one of the superior courts of law has been throughout followed,—engrafting such alterations as seemed required by reason of the absorption of the Court of Chancery into the Supreme Court established by the Judicature Act, 1873; with especial reference to that Rule of Procedure annexed to the Act, which provides (as already mentioned) that bills and informations in chancery shall hereafter be instituted by a proceeding to be called an action, and be commenced by a writ of summons of the species hitherto in use only in actions at law. It may, however, be convenient

(*x*) 36 & 37 Vict. c. 66, sched. r. 43.
(*y*) Rule 45.
(*z*) Rule 44.

here shortly to apprise the reader by what steps a suit in chancery has been hitherto conducted; whereby he will be enabled the better to understand the extent to which the course of an action which has for its object to obtain a *legal* remedy, will coincide with an action which has for its object to obtain some *equitable* remedy or redress, and at what point they will of necessity diverge.

The first commencement, then, of a suit in chancery has hitherto been by preferring a "bill" to the Lord Chancellor, setting forth the circumstances of the case, as some fraud, hurt, or hardship; and, as the general rule, praying some equitable relief (*a*); and if the object of the bill has been to stay waste or other injury, or to stay proceedings at law, an injunction is also prayed (*b*). The bill has been required to be signed by counsel as a certificate of its decency and propriety, and it is filed in court, and served on the defendant; and if on service of the bill he neglects to appear within the proper time, the plaintiff applies that an appearance be entered for him; and such further proceedings are then had in the cause as if defendant had actually appeared (*c*).

If, on the other hand, the defendant absconds, so that it is found impracticable to serve the bill, the court will order an appearance at a certain day; and if the defendant fails to appear at the time so appointed, the court, in this case also, orders an appearance to be entered for him (*d*). In cases also where the defendant's intention to leave the kingdom, in order to avoid process, is known, and there

(*a*) In certain cases, however, where the rights of the crown are concerned (or the rights of those under its particular protection, such as the objects of a public charity), the matter of complaint has been brought forward by way of *information* instead of bill. As for a *petition*, it is usually a proceeding of an *interlocutory* kind, adopted in cases where a more special statement is required than can be conveniently comprised by a mere notice of motion. But in some cases relief is authorized by statute to be applied for in a summary way "by petition." (See, for example, 25 & 26 Vict. c. 53, s. 1.)

(*b*) See Wood *v.* Beedell, 3 Sim. 773.

(*c*) 15 & 16 Vict. c. 86, s. 4.

(*d*) Ibid.

is an equitable demand against him of a pecuniary kind and of certain amount, the plaintiff may apply to the court for a writ of *ne exeat regno* to restrain the defendant's departure, until security for payment shall have been given (*e*).

Upon the defendant's appearance, the plaintiff is entitled to have the defendant examined in answer to the bill, and for that purpose to file "interrogatories," a copy of which is delivered to the defendant, who within due time must either put in his *answer*, or his *demurrer* or *plea;* and even if the plaintiff requires no answer, yet it is competent to the defendant, if he thinks fit, to put in any of these, of his own accord. If on the other hand, on an answer being required, he neither answers, pleads nor demurs, he is then said to be in contempt; and upon proper process in that behalf he may be committed to prison, or, (if not to be found,) his lands and goods may be sequestrated, until he clears his contempt.

But the regular course for the defendant to pursue is either to demur, to plead, or to answer.

A *demurrer* in equity, as hitherto allowed, is nearly of the same nature as a demurrer in law, being an appeal to the judgment of the court, whether upon the face of the bill itself the defendant shall be bound to answer (*f*). And the effect of a demurrer is that, if allowed, the plaintiff's bill is dismissed; if overruled, the defendant is ordered to answer.

A *plea* in equity has been founded upon some matter not apparent on the face of the bill; and may be either to the jurisdiction, showing that the court has no cognizance of the cause; or to the person, showing some disability in the plaintiff,—as by outlawry and the like. Or it may be in bar; showing some matter wherefore the plaintiff can demand no relief,—as an Act of Parliament, a release, or a formal decree. And the truth of any plea

(*e*) See Dan. Pr. 4th edit. p. 1586. (*f*) Vide sup. p. 511.

the defendant is bound to prove, if put upon it by the plaintiff. And inasmuch as bills are often of a complicated nature, and contain various matters, a defendant has been allowed to plead as to part, demur as to part, and answer as to the residue.

An *answer* is the most usual defence made to a plaintiff's bill. It is the statement of the defendant himself as to those matters of fact to which the bill refers, or as to which interrogatories are filed; and by means of it, the plaintiff obtains a *discovery* of facts which it might be otherwise impossible to prove. This statement is given in upon oath, or the honour of a peer or peeress (*h*); but where there are amicable defendants, their answer has been usually taken without oath, by consent of the plaintiff.

An answer must either deny or confess all the material parts of the bill. And where it does not deny, it may confess and avoid, that is, justify or palliate the facts; or it may simply admit the case made by the bill, and submit to the judgment of the court upon it. But the defendant may in his answer, besides addressing himself to the bill or interrogatories, introduce such statements material to the case, as he may think it advisable to set forth; and he is also at liberty, in support of his case, to file interrogatories for the examination of the plaintiff, in order to obtain from him a discovery of any material facts (*i*). Where, however, he has any relief to pray against the plaintiff, it has been necessary for him to have recourse to an original bill of his own, called a *cross bill*.

If the plaintiff considers the answer as insufficient, he may take *exceptions* thereto, and these, if allowed, will oblige the defendant to put in a more sufficient answer. On the other hand, if the plaintiff finds sufficient matter confessed in the answer to ground a decree upon, he proceeds to the *hearing of the cause upon bill and answer*

(*h*) But if a peer be examined as a *witness*, he must be sworn. (Meers *v.* Lord Stourton, 1 P. W. 146.)

(*i*) 15 & 16 Vict. c. 86, s. 19.

only; but in that case, he must take the defendant's answer to be true in every point (*k*). If, therefore, he finds that it would be unsafe to admit this, and that his case requires him to controvert the truth of some matter that the defendant has alleged; or to go into evidence in support of what he has himself alleged; he *replies* to the answer, to the effect that he "hereby joins issue with the defendant." So a reply to the same effect is filed by the plaintiff, in case he shall not have required an answer, and the defendant shall not have exercised his right of putting in an answer, plea or demurrer, without requisition,—for the rule has been, that the defendant in this case is considered as having *traversed* (or denied) the case made by the bill. Upon the filing of the reply, either under these circumstances, or after an answer made, the cause is deemed to be *at issue;* and the parties then proceed to proof of the facts.

However, it is competent to the plaintiff under any circumstances, instead of filing a reply, to take the course, (after answer, or after the time for answer has expired,) of *moving the court for such decree or decretal order as he may think himself entitled to;* upon which both he and the defendant are at liberty to file affidavits on either side: and the cause is disposed of in a summary way, upon motion; or the court gives such directions as to the further prosecution of the suit, as the circumstances may be found to require.

But, if instead of this, a reply be filed, and the cause be brought to issue, and the parties proceed to proof in the regular way;—the plaintiff (or any defendant) may apply for an order that the evidence in chief, as to any particular facts or issues, shall be taken *vivâ voce* at the hearing of the cause, and in case such application is granted, both the examination in chief, and also the cross-

(*k*) As to the consequence of the plaintiff's failing to proceed in due course after answer, see Leite v. Johnson, Law Rep., 5 Eq. Ca. 266; Hubert v. Barrett, ib. 435.

examination and re-examination, as to the facts and issues specified in the order made, are taken before the court at the hearing accordingly. In case, however, no such application or order shall be made,—and as to any facts or issues not included by any such order made,—each party in a cause is at liberty to verify his case, either wholly or partially, by the oral examination of witnesses *ex parte* before one of the examiners of the court, or before a special examiner appointed for the purpose (*l*). At such examination, only the party producing the witness, his counsel, solicitor or agent, have a right to be present. And the examiner takes down their depositions, which are afterwards transmitted by him to the record office of the court to be filed; and any party to the suit is entitled to have copies thereof, on payment of a regulated fee. As to the proof so taken, we need only add, that the rules as to the competency of witnesses, and generally the whole law of evidence, are the same as those to which our attention has already been called in a former part of this chapter (*m*).

The evidence (however taken) must be *closed* within a certain period, limited by the practice of the court; and the cause is then ripe to be set down for hearing; and either party may be *subpœnaed* to hear judgment on the day fixed for the hearing; and then, if the plaintiff does not attend, his bill is dismissed with costs. On the other hand, if the defendant makes a default, a decree is made against him.

When there are cross causes, or a cross bill filed by the defendant against the plaintiff in the original cause, they are generally contrived to be brought on together, that the same hearing and the same decree may serve for both of them. The method of hearing causes in court is this. The parties on both sides appearing by their counsel, the plaintiff's counsel open the pleadings and state his case, the matters in issue, and the points of equity arising there-

(*l*) As to the examiners of the Court of Chancery, see 16 & 17 Vict. c. 22.

(*m*) Vide sup. pp. 536—545.

from. They also read in court such affidavits and depositions as may have been taken by the plaintiff, together with such parts of the defendant's answer as are thought material or convenient, and make their observations and arguments thereon. Then the defendant's counsel go through the same process for him, and the leading counsel for the plaintiff is heard in reply. When all are heard the court pronounces the *decree*, adjusting every point in debate according to equity; which decree being usually very long, the minutes of it are taken down by the Registrar.

The decree is either *interlocutory* or *final*. It very seldom happens that the first decree can be final, or conclude the cause; for, if any matter of fact is strongly controverted, the court usually directs the matter to be tried by jury; especially such facts as the validity of a will, or whether A. is the heir at law to B. This was formerly (as no jury could then be summoned to attend the Court of Chancery,) always directed to be tried in a court of common law, and in the form of a *feigned issue;* that is, a series of pleadings was arranged between the parties, in the same form as if an action had been commenced at common law, upon a *wager* involving the fact in dispute; and the issue joined thereon was referred, (as it would be in the case of an ordinary action,) to a jury. But *feigned issues* were disused after the 8 & 9 Vict. c. 109, s. 19, which made it lawful for any court either of law or equity to refer any question of fact to a jury in a direct form. And by 21 & 22 Vict. c. 27, ss. 3—6, provisions were made enabling the Court of Chancery itself to summon a jury to try any questions of fact. Moreover, it was, at one time, the practice to refer questions of law to the opinion of one of the superior courts of common law; who, after argument, certified their opinion to the Lord Chancellor, and on such certificate the decree was usually founded. But by 15 & 16 Vict. c. 86, s. 61, the practice of directing a case to be stated for the opinion of a com-

mon law court was prohibited,—power being, at the same time, given to the Court of Chancery to determine any questions of law necessary to the decision of the equitable question at issue (*n*).

Another thing also retards the completion of decrees. Frequently long accounts are to be settled, incumbrances and debts to be inquired into, and a hundred little facts cleared up, before a decree can do full and sufficient justice (*o*). The investigation of these matters is conducted either before the Master of the Rolls, (or by one of the Vice-chancellors,) sitting *at chambers;* or before his chief clerk acting there under his direction. And the result is stated in the form of a short certificate, (or, if the judge so directs, a formal report); which, if the judge approves, he signs and adopts.

When the inquiries, directed by the decree, are completed, the cause is again brought before the court. A final decree is then made, the performance of which is enforced, if necessary, by attachment of the person and sequestration of the estate (*p*). On due service also of a decree or order for delivery of possession of an estate, the party prosecuting the same is entitled to a *writ of assistance;* directed to the sheriff of the county in which the lands lie, and authorizing him to enter the premises, eject the defendant, and put the plaintiff in possession. Moreover, by 11 Geo. IV. & 1 Will. IV. c. 36, s. 15, where any person has been committed for a contempt, for not executing any instrument as the court has directed, the court may, under such circumstances as in the statute mentioned, order the same to be officially executed.

(*n*) See also 25 & 26 Vict. c. 42. By 14 & 15 Vict. c. 83, s. 8, provisions were made for obtaining, upon the request of the lord chancellor, the presence of one of the common law judges at the sitting of the court.

(*o*) 3 Bl. Com. 453.

(*p*) See Roberts *v.* Ball, 3 Smale & Giff. 168. By the Debtors Act, 1869, it is provided that sequestration against the *property* of a debtor may be issued by any court of equity in the same manner as if such debtor had been actually arrested (32 & 33 Vict. c. 62, s. 8).

If by the decree either party thinks himself aggrieved, he may petition for a *rehearing* before the judge by whom it was pronounced, or (unless pronounced by the Lord Chancellor himself), may *appeal* to the Lord Chancellor, who, if he thinks fit, may refer the matter to the Court of Appeal in Chancery (*q*). But after the decree is once signed and enrolled,—it cannot be reheard or rectified except by bill of review, or by appeal to the House of Lords (*r*).

A *bill of review* may be had upon apparent error in judgment, appearing on the face of the decree; or, (by special leave of the court,) upon oath made of the discovery of new matter of evidence, which could not possibly be had or used at the time when the decree passed. But no new evidence or matter, then in the knowledge of the parties, and which might have been used before, is sufficient ground for a bill of review.

We have thus touched upon the principal incidents of a suit in chancery as now existing; and an attentive consideration of them will lead to the conclusion that many of them will be retained in their essential characteristics, though probably some of the terms which now obtain will fall out of use. It is true that in an action, whatever be the relief sought, if any facts are disputed, the pleadings (by whatever names they are called) will result in an issue or issues, which must be tried by affidavit or by the verdict of a jury. But from the point of issue (and in many of the interlocutory incidents) it is apprehended that the course of an action must necessarily differ according to the nature of the relief required. If legal redress be desired, then the judgment will, as the general rule, be of the brief and inelastic form hitherto in use in the courts of law, and such judgment will be signed after demurrer or verdict

(*q*) Vide sup. p. 331. (*r*) Ibid.

according to the distinctions already explained; but if, on the other hand, some equitable remedy or relief be sought, then there must be a hearing of the action as hitherto in a suit in chancery: and after such hearing, an interlocutory or final decree must be framed in accordance with the decision of the court. And it may be conjectured that the rules hitherto in force with regard to the steps through which such final decree is ultimately arrived at, and most of which have been adverted to in the preceding sketch of a suit in chancery, will still be substantially adhered to under the fresh system of practice which will be set on foot in the chancery division of the High Court of Justice.

CHAPTER XI.

OF THE PROCEEDINGS IN SOME PARTICULAR ACTIONS.

HAVING now taken a compendious though comprehensive view of the course of proceeding in an action in general, it may be useful to advert shortly to some varieties upon that course, as exhibited in the case of the particular actions of *dower*, *quare impedit*, *replevin*, and *ejectment*; as to which, however, it is to be understood that their deviation is confined, in general, to the instances we are about to specify, and that in other respects they are conducted in conformity to the regular system of which we have given an account.

I. The action of dower *unde nihil habet* was, formerly, commenced, not by summons, but by *original writ*, of the nature of which an account has elsewhere been given (*a*); and which, it will be remembered, was antiently the process used for beginning all suits, though, in personal actions, its use became in the course of time evaded (*b*). In real and mixed actions, however, it was retained (long after its general abandonment), together with an antiquated and cumbrous process upon it to procure the appearance of the defendant (*c*). But by the

(*a*) Vide sup. p. 397, where it is mentioned that the other action of dower, viz., "the writ of right of dower," has always been of rare occurrence. Its existence, however, is recognized in 23 & 24 Vict. c. 126, s. 26; and supposing such an action to be brought, its proceedings would be the same as those in an action of dower *unde nihil habet*.

(*b*) Vide sup. p. 489.

(*c*) Under this process, as used in dower, the defendant (or *tenant* as he is called in a real action) was called on to appear by the sheriff's sticking up a form of written sum-

23 & 24 Vict. c. 126, (called the Common Law Procedure Act, 1860,) both the original writ itself, and the subsequent process upon it, were, even in these cases, abolished; it being enacted, that no original writ of dower or dower *unde nihil habet*, and no plaint for free-bench or dower in the nature of any such writ (*d*), should be brought after the commencement of that Act in any court whatsoever; but that where any such writ, action or plaint would at the date of that statute lie either in a superior or in any other court, an action might be commenced by writ of summons issuing out of the Common Pleas, in the same manner and form as the writ of summons in an ordinary action (*e*). That Act also proceeds to direct, that upon such writ shall be endorsed a notice that the plaintiff intends to claim in dower, or for free-bench, as the case may be; and that the service of such

mons, and leaving it, on the premises out of which the dower is claimed. (See Garrard *v.* Tuck, 8 C. B. 231.) And in order to secure notice to the tenant, the summons had (by 31 Eliz. c. 3, s. 2) to be *proclaimed* in the church, which proclamation was afterwards directed, by 7 Will. 4 & 1 Vict. c. 49, to be affixed to the church doors instead. And after the original writ had been returned into court, the tenant was entitled to *cast an essoign*, that is, allege an excuse for failing to appear. (See Twining *v.* Lowndes, 10 Bing. 65.) In default of appearance, the *demandant* (as the plaintiff is termed in a real action) was entitled to sue out further process, called a *grand cape;* under which the sheriff was directed to take possession into the hands of the Crown of the premises claimed; and then, if, on the return of the *grand cape*, there was still no appearance, the demandant was entitled to judgment. If on the other hand the tenant appeared, then the next step was for the demandant to *count* (which is equivalent to declaring in a personal action), and by her count to make demand, in general terms, of the third part of the lands of her deceased husband. (See William *v.* Gwyn, 2 Saund. by Wms. 43—45 a; Roscoe on Real Actions, p. 282.)

(*d*) Plaints, in the nature of real or mixed actions, were the method of commencing remedies for the recovery of land in inferior courts,—such as the court baron and the sheriff's county court, and courts of record having jurisdiction under their charters to entertain plea of land. As to *free-bench*, it is the name under which dower is, by the custom of some manors, claimable in the lord's court in respect of lands of copyhold tenure. (See Fits. Nat. Brev. 155 P.)

(*e*) 23 & 24 Vict. c. 126, s. 26.

writ, the appearance of the defendant, the proceedings in default of appearance, the pleadings, judgment, execution, and all other the proceedings and costs on such writ, shall be subject to the same rules and practice, as nearly as may be, as the proceedings in an ordinary action commenced by writ of summons (*f*).

Among the defences peculiar to the action of dower, is that of *ne unques seisie que dower*, viz. that the demandant's husband was never seised of such an estate in the lands in question as could give the demandant a legal claim to dower; another is *ne unques accouple en loial matrimonie*, viz. that the demandant and her supposed husband were never joined in lawful matrimony; another, that the husband is still living; another, that the demandant eloped from her husband and lived in adultery with another person (*g*); and another is *tout temps prist*, viz. that from the death of the husband the tenant has always been and still is ready to render the demandant her dower, and rendereth the same into the court (*h*). And to the defence *ne unques accouple*, the demandant may reply that she was married at such a place, in such a diocese; on which it has been the course to award a trial by certificate (*i*); the court sending to the bishop of that diocese to certify whether there was a marriage or not. To the defence that her husband is still living, she may reply his death; and the practice has been that the issue thereon shall be tried by witnesses (*j*); but all other issues are triable by jury (*k*).

At the common law there were neither *damages* nor

(*f*) The provisions of 15 & 16 Vict. c. 76, and 17 & 18 Vict. c. 125, in particular, were made applicable to such writ, pleadings, and proceedings. (23 & 24 Vict. c. 126, ss. 26, 27.) No special notice of the action of dower is made in the rules of procedure annexed to the Judicature Act, 1873.

(*g*) Hetherington *v.* Graham, 6 Bing. 135.

(*h*) As to this plea, see Sarah Watson, *dem.*, John Watson, *ten.*, 10 C. B. 3.

(*i*) Vide sup. p. 513, n. (*m*).

(*j*) As to the trial by witnesses, vide sup. p. 513, n. (*m*).

(*k*) Roscoe, 222, 300.

costs in dower. But by the statute of Merton, (20 Hen. III. c. 1,) it was enacted, that if a widow shall recover her dower of the lands whereof her husband died seised, the tenant shall yield damages, that is to say, the value of the dower from the time of the death of the husband, until the day the widow shall have judgment to recover seisin. And by the statute of Gloucester, (6 Edw. I. c. 1,)—which gave costs in all cases where the party is entitled to damages,—and by the subsequent statutes of 4 Jac. I. c. 3, and 8 & 9 Will. III. c. 11, costs were made recoverable by the successful party, (whether demandant or tenant,) in this action. In addition to which, there is now, also, the above-mentioned provision of 23 & 24 Vict. c. 126, s. 27 (*l*). If the jury find a verdict for the demandant, they ought also to find, 1, that her husband died seised, and also of what estate, and the time of his death; 2, the annual value of the land; 3, the amount of damages she has sustained by the detention of her dower. And the judgment in this action, when given for the demandant, has been, that she recover seisin of a third part of the tenements in demand, to be set forth by metes and bounds, together with the damages and costs (*m*).

II. The action of *quare impedit* also used to commence by original writ (*n*); and, as the general rule, such writ was returnable into the Common Pleas only (*o*). This original writ directed the sheriff to command the defendants who disturbed the presentation, (that is, in general, the bishop, patron and clerk,) to permit the

(*l*) All the above enactments, however, will be subject to that provision in the rules of procedure annexed to the Judicature Act, 1873, which leaves all questions of costs to the discretion of the court. (36 & 37 Vict. c. 66, sched. r. 47.)

(*m*) William *v.* Gwyn, 2 Saund. by Wms. 44 e.

(*n*) As to a *quare impedit*, vide sup. pp. 361, 362, 416—420; and see Tolson *v.* Bishop of Carlisle, 3 C. B. 41; 5 C. B. 761.

(*o*) At the suit of the *Crown*, however, it might be made returnable into the Queen's Bench. (See Dyversité des Courtes, Ch. Bank le Roi.)

plaintiff to present a fit person (without specifying whom) to such a vacant church which he claimed to be in his gift, and his presentation to which the defendants unjustly hindered; and unless they so did, then to appear in court on such a day, to show why they hindered him (*p*). But by the Common Law Procedure Act, 1860, it was enacted, that no *quare impedit* should be brought, after the commencement of that Act, in any court whatsoever; but that, where a *quare impedit* would lie at the date of that statute, either in a superior or in any other court, an action might be commenced by writ of summons, issuing out of the Common Pleas, in the same manner and form as the writ of summons in an ordinary action; and upon such writ should be endorsed a notice that the plaintiff intends to declare in *quare impedit* (*q*). And by the same Act, the service of such writ, the appearance of the defendant, the proceedings in default of appearance, the pleadings, judgment, execution, and all other proceedings and costs upon such writ, were made subject to the same

(*p*) "Immediately on the suing "out of the *quare impedit*," says Blackstone (vol. iii. p. 248), "if the "plaintiff suspects that the bishop "will admit the defendant or any "other clerk pending the suit, he "may have a prohibitory writ, "called a *ne admittas*," and "if the "bishop doth, after the receipt of "this writ, admit any person, even "though the patron's right may "have been found in a *jus patronatûs*, then the plaintiff, after he "has obtained judgment in the "*quare impedit*, may remove the "incumbent, if the clerk of a "stranger, by *scire facias*, and "shall have a special action against "the bishop, called a *quare incumbravit*, to recover the presentation, and also satisfaction in "damages for the injury done him "by incumbering the church with "a clerk pending the suit, and after "the *ne admittas* received." The *quare incumbravit*, however, was a real action, and was abolished by 3 & 4 Will. 4, c. 27; and it would seem that there is no necessity for a *ne admittas*, where all proper parties have been made defendants in the *quare impedit;* for if the bishop be a defendant, no lapse can occur *pendente brevi*, (Wats. C. L. 112;) and if the clerk be defendant, then, though he was admitted prior or pending the *quare impedit*, he is removed by the mere effect of the judgment in that action. (Ibid. 289, 290.)

(*q*) 23 & 24 Vict. c. 126, s. 26.

rules and practice, as nearly as might be, as the proceedings in an ordinary action (*r*).

The plaintiff in this action must, in his statement of complaint, show a title in himself or his ancestors, or those under whom he claims,—an actual presentation under that title, and a disturbance before the action brought (*s*). Upon this, the bishop and the clerk usually disclaim all title, save only, the one as *ordinary* to admit and institute, and the other, as presentee of the patron; who is left to defend his own right (*t*). Indeed it was a rule at the common law, that neither the ordinary nor clerk were at liberty to plead to the right of patronage, as neither of them had anything therein; but by 25 Edw. III. st. 3, c. 7, the ordinary may now do so, provided he has himself collated by lapse, and the clerk, if he has been collated, or presented and instituted (*u*); that is, they may respectively defend their own right so to collate, or be instituted. Or if they mean to deny that they have obstructed the presentation, they may each state by way of defence the general issue *ne disturba pas* (*x*); and as this does not deny the right of the plaintiff, it entitles him, so far as these defendants are concerned, to immediate judgment to recover his presentation; though he has also the option of maintaining, if he thinks fit, that a disturbance has in fact been committed, which, if proved, will give him a right to recover damages. The bishop may also defend himself on the ground that the clerk presented by the

(*r*) 23 & 24 Vict. c. 126, s. 27. The provisions of the Common Law Procedure Acts of 1852 and 1854, in particular, were made applicable to such writ, pleadings and proceedings. The rules of procedure annexed to the Judicature Act, 1873, contain no special reference to a *quare impedit*.

(*s*) Brickhead *v.* Archbishop of York, Hob. 250.

(*t*) See 3 Bl. Com. 249.

(*u*) 7 Rep. 26 a; Elvis *v.* Archbishop of York, Hob. 392; Queen and Middleton's case, 1 Leon. 45; Apperley *v.* Bishop of Hereford, 9 Bing. 681; Storie *v.* Bishop of Winchester, 9 C. B. 62; 17 C. B. 653; Roscoe on Real Actions, 231, 239, 241.

(*x*) Celt *v.* Bishop of Coventry, Hob. 193; R. *v.* Bishop of Worcester, Vaughan, 58.

plaintiff was unfit, for want of learning or otherwise, to be instituted (*y*). The patron, also, may rely on the defence of *plenarty*, viz. that the church has been full for six calendar months before the issue of the writ, by virtue of his own presentation (*z*); or may state, by way of defence, like the ordinary and clerk, and with the same effect, the general issue of *ne disturba pas* (*a*); or may traverse the title alleged by the plaintiff in his declaration. Here, however, this difference is to be observed, that though, as a mere answer to the action, such traverse is a sufficient defence, yet it may be often necessary to go further; for in a *quare impedit* both parties are in a manner plaintiffs, and either of them entitled to a judgment that he recover the presentation, and have a writ to the bishop for the admission of his clerk: if, therefore, the patron wishes to obtain a judgment of this description, and not merely a judgment discharging him from the action, (which will naturally be the case, unless he has presented, and his clerk has been actually admitted,) he must, in addition to the traverse, set forth some matter showing title in himself (*b*).

The trial in *quare impedit* is in some instances by certificate, but in general by jury (*c*). And upon the failure of the plaintiff at the trial to make out his title,

(*y*) Vide sup. vol. II. p. 685. See Bishop of Exeter *v.* Marshall, Law Rep., 3 App. Cas. 17.

(*z*) Stat. Westm. 2, c. 5, vide sup. p. 415. A question is made in Roscoe on Real Actions, (p. 234,) as to the effect that the statute of 7 Anne, c. 18, has had as to a defence of plenarty. It is laid down that the *clerk* also may rely on the defence of plenarty, but then he must show that the presentation was a lawful title. (Lister *v.* Crameel, Noy, 30; S. C. 1 Brownl. 162; Roscoe on Real Actions, 240.)

(*a*) Colt *v.* Bishop of Coventry, Hob. 193; R. *v.* Bishop of Worcester, Vaughan, 58.

(*b*) Tufton *v.* Temple, Vaugh. 78. See Carlisle *v.* Whaley, Law Rep., 2 App. Cas. 391, 409.

(*c*) Vide sup. p. 513. In Roscoe on Real Actions, 503, it is said that not only the issue on the *ability of the plaintiff's clerk*, if the clerk be alive, must be tried by certificate; but also the several issues arising upon *institution*, *deprivation*, *resignation*, or *plenarty*. (As to trial by certificate, see 3 Bl. Com. p. 333.)

the defendant is put upon the proof of *his*,—that is, if he has asserted title in his statement of defence. If the right be found for the plaintiff, three further points are also to be inquired into,—1. Whether the church be full or not; and if it be, upon whose presentation it is full;—2. The yearly value of the church;—3. Whether six calendar months have passed since the avoidance;—all which matters are material to be ascertained, in order to determine the nature of the damages to which the plaintiff may be entitled (*d*). For at common law no damages were recoverable in a *quare impedit;* but by the statute of Westminster the second, (13 Edw. I. c. 5,) if more than six calendar months have passed by reason of the disturbance of any person, so that the bishop has presented by lapse, and the true patron has lost his presentation, damages shall be adjudged against the disturber, to the amount of the value of the church for two years; or if the six calendar months have not passed, then damages to the value of the moiety of the church for one year (*e*).

The judgment for the plaintiff in a *quare impedit* is that he recover his presentation, and have a writ to the bishop, commanding him to admit his clerk (*f*); and also that he recover his damages and costs; and such also (with the exception of the damages) is the judgment for

(*d*) 2 Inst. 362; 6 Rep. 49 a; Poyner *v.* Chorleton, Dy. 134 b; 3 Bl. Com. 249.

(*e*) 6 Rep. 51 a; Inst. ubi sup.; Henslow *v.* Bishop of Sarum, Dy. 76 b. An additional reason is given in the books (see Wats. C. L. 291), as far as regards the first point, viz. that, unless this is ascertained, it will not appear whether the plaintiff is entitled to recover his presentation; because the church may be full upon the presentation of some stranger, not party to the *quare impedit;* and whose title may be better than the plaintiff's. According to Blackstone (vol. iii. p. 249), the reason for inquiry into the third point, (which he describes as whether six calendar months have passed *between the avoidance and the time of bringing the action,*) is, that, if that period of time has passed, the case "would not be "within the statute (13 Edw. I, "c. 5, s. 2) which permits an usur- "pation to be divested by a *quare* "*impedit* brought *infra tempus* "*semestre.*" (Vide sup. p. 415.)

(*f*) F. N. B. 38.

the defendant, where he has made out his own title to present (*g*). No costs, indeed, were recoverable by either party, in *quare impedit*, until a recent period (*h*). But by 4 & 5 Will. IV. c. 39, it was enacted, that where a verdict is given for the plaintiff, he shall have his costs in addition to his damages; and where a verdict is given against him, or he shall discontinue, or be nonsuited, he shall pay costs to the adverse party; though this is subject to a proviso, that no judgment for costs shall be had against any archbishop, bishop, or other ecclesiastical patron or incumbent, if the court or judge shall certify that he had probable cause for defending the action; it being however declared, that in no case, where the defence shall be grounded on a presentation or collation previously made, shall such presentation or collation be deemed a probable cause of defence within the meaning of the proviso. In addition to which there is now the provision of 23 & 24 Vict. c. 126, s. 27 (already noticed in reference to the action of dower), which enacts that all the proceedings and *costs* upon the writ of summons in *quare impedit*, shall be subject to the same rules and practice, as nearly as may be, as in an ordinary action (*i*).

III. In the action of *replevin* (the nature of which remedy has been already generally explained) the proceedings used to commence by a species of original writ, which directed the sheriff not to summon the defendant into any of the superior courts at Westminster, but to replevy the goods, and determine the matter in the common law county court incident to his own jurisdiction (*k*). But this mode

(*g*) Wats. C. L. 295. If the bishop, upon receiving the writ *ad admittendum clericum*, (says Blackstone, vol. iii. p. 250,) does not admit the plaintiff's clerk, the latter may sue him in a *quare non admisit*, and recover satisfaction in damages.

(*h*) Edwards *v.* Bishop of Exeter, 6 Bing. N. C. 146.

(*i*) See also 36 & 37 Vict. c. 66, sched. r. 47, cited sup. p. 608, n. (*l*).

(*k*) As to replevin, vide sup. pp. 256, 420.

long since became obsolete; the course having been introduced by several antient statutes of *levying a plaint* in such court, *without original writ*, and thereon obtaining from the sheriff a replevin of the goods (*l*). It has been shown, however, in a former place, that this method has now in turn been superseded by modern enactments, which direct the application for a replevin to be made to the Registrar of the county court within the district of which the distress was taken; which shall be granted on the owner giving security that he will commence and prosecute an action of replevin against the distrainor either in the county court, or in the superior court (*m*). And to this we have now to add, that if the action of replevin be brought by the owner of the goods in the superior court, it commences by writ of summons, as in any other personal action (*n*).

If such action be brought then, upon the appearance of the distrainor, the next step is for the owner of the goods to make his statement of complaint; and if he omits to do so in due time, the defendant may sign judgment of *non pros.* The statement of the plaintiff (which alleges in general terms the taking of the goods in a certain place) being delivered, the subsequent course of pleading has differed from that pursued in other actions, chiefly in the following particular: that the defendant's defence may not only tend to his acquittal or discharge from the action, but may claim a *return* of the goods, admitting that they were taken, but insisting that they were lawfully taken as a distress. Such a defence has been called an *avowry*, or (if the distress was made not in the defendant's own right but as servant for another), a *cognizance.* In answer to an avowry, the plaintiff was

(*l*) Vide sup. p. 422, n. (*x*).

(*m*) Vide sup. p. 421.

(*n*) 19 & 20 Vict. c. 108, s. 65. The rules of procedure annexed to the Judicature Act, 1873, contain no special reference to the action of replevin.

enabled by 23 & 24 Vict. c. 126, s. 23, to pay money into court in satisfaction of the rent (in the case of a distress for rent) alleged therein to be in arrear, in like manner, and subject to the same proceedings as to costs and otherwise, as upon a payment into court by a defendant in other actions; it being however provided, that such payment into court shall not, nor shall the acceptance thereof by the defendant in satisfaction, work a forfeiture of the replevin bond into which the plaintiff entered in the county court (*p*). If, however, the plaintiff does not adopt this course, his next pleading is a *defence in bar* (as by denying any rent to be due); to which the defendant *replies;* the names of the pleadings subsequent to the avowry or cognizance being thus transposed and thrown into a reversed order from that in which they stand in ordinary cases. Also, where the distress was for rent, the statute 11 Geo. II. c. 19, gave the defendant the power of resorting to a *general* form of avowry or cognizance; a provision introduced to protect landlords from the inconvenience of specially setting forth their title. Instead of an avowry or cognizance, however, the defendant may plead some other defence, to which the plaintiff may reply or join issue thereon, according to the ordinary course of pleading. Thus, the defendant may state as his defence *non cepit;* viz., that he did not take the goods; which is considered as the general issue in replevin. And it is further to be understood, that the defendant has been held entitled to make several avowries, and both to avow and demur; and that each party has similar rights throughout the whole series of pleading, according to the principle generally established in ordinary actions.

It is said that the issue may be made up either by plaintiff or defendant (*q*); for as the defendant, in case of a judgment in his favour, may obtain a return of the goods, both parties are considered as in a manner plaintiffs,—a

(*p*) 23 & 24 Vict. c. 126, s. 24. (*q*) Roscoe on Real Actions, p.

circumstance in which this action is analogous to that of *quare impedit* (*r*). As to the judgment, it awards, when given in favour of the plaintiff, damages for the unlawful taking and detaining; when given for the defendant, either a return of the goods, or, if the distress was for rent, then, at the option of the defendant, a recovery of the amount of rent in arrear. For by 17 Car. II. c. 7, if the plaintiff discontinue before issue joined, then,—upon suggestion made on the record, in nature of an avowry or cognizance, or if judgment be given against him on demurrer, then without any such suggestion,—the defendant might have a writ to inquire into the value of the distress by a jury, and recover the amount of it in damages, if less than the arrear of rent; or if more, then so much as shall be equal to such arrear, with costs. Or if the plaintiff be nonsuited, or if the verdict be against him, then the statute directed that the jury should assess such arrears for the defendant; and if (in any of these cases) the distress were found insufficient to answer the arrears distrained for, that the defendant might take a further distress or distresses.

[Where the defendant has judgment for a return of the goods, there has issued in his favour a writ *de retorno habendo*, whereby the goods are returned again into his custody, to be sold or otherwise disposed of, as if no replevin had been made. And when this judgment is by the default or nonsuit of the plaintiff, he might, at the common law, have brought another replevin, and so *ad infinitum*, to the intolerable vexation of the defendant; whereupon the Statute of Westminster 2 (13 Edw. I. c. 2), restrained the plaintiff, when nonsuited, from suing out any fresh replevin; but allowed him a *judicial* writ issuing out of the original record (called a writ of *second deliverance*), in order to have the same distress again delivered to him on giving the like security as before. But if the plaintiff were a second time nonsuit, or if the

(*r*) Vide sup. p. 608.

[defendant had judgment upon verdict or demurrer in the first replevin, the defendant was to have a writ of *return irreplevisable;* after which no writ of second deliverance was allowed (*s*). On the other hand, if, pending a replevin for a former distress, a man distrained again for the same rent or service, then the owner was not driven to his action of replevin, but allowed a writ of *recaption* (*t*); whereby he recovered damages for the defendant's contempt of the process of the law in making a second distress while the matter was *sub judice.*] In replevin, as in other actions, costs are now recoverable (*u*); and by statute 11 Geo. II. c. 19, if the replevin be founded on a distress for rent, quit rents, relief, heriot, or other service (*x*), and the plaintiff shall become nonsuit, discontinue, or have judgment against him, the defendant was made entitled to recover *double* costs of suit. But by 5 & 6 Vict. c. 96, s. 2, double costs in this case (as in all others where they are given by any public act of parliament) were reduced to "such "full and reasonable indemnity as to all expenses in- "curred, as shall be taxed by the proper officer in that "behalf."

IV. We now arrive at *Ejectment,* by far the most important of the actions of which we proposed in this chapter to treat; being indeed (with the exception of dower) the only action in which land is now capable of being specifically recovered (*y*). Some explanation has been already given of the manner of its introduction into our judicial system, and reference has been made to the manner in which it has been recently remodelled (*z*).

(*s*) 2 Inst. 340.

(*t*) F. N. B. 71.

(*u*) Statute of Gloucester, 6 Edw. 1, c. 1, s. 2; 7 Hen. 8, c. 4; 21 Hen. 8, c. 19, s. 3; 17 Car. 2, c. 7, s. 2. But see 36 & 37 Vict. c. 66, sched. r. 47, cited sup. p. 608, n. (*l*), as to the discretion of the court under the provisions of that Act.

(*x*) This statute applies to a rent-charge, as well as rent-service. (Jamieson *v.* Trevelyan, 10 Exch. 748.)

(*y*) As to ejectment, vide sup. pp. 362, 393, 396.

(*z*) Vide sup. p. 393.

But in matters of law, no reform, however valuable in other respects, can enable us to repose in entire ignorance of the institutions which it displaces; and some acquaintance with them will still be necessary to our correct apprehension of those Records and Reports from which the principles of the law, in general, are best to be collected. Before we proceed, therefore, to any explanation of the present form of an ejectment, it will be proper to advert to that which it wore prior to modern improvements. The action, then, began as follows:—The claimant served the tenant in possession of the land with what was called a "declaration" (no previous process being issued), in the form properly belonging to the statement of the plaintiff's claim in trespass *quare clausum fregit*(*a*). This declaration was a mere string of fictions, complaining at the suit of a fictitious plaintiff, (for example, John Doe,) against a fictitious defendant, (for example, Richard Roe,) that a lease for a term of years having been made to Doe, by the claimant, and Doe having entered thereupon—the defendant, Roe, ousted him;—for which Doe claimed damages (*b*). And subjoined was a *notice to appear*, addressed to the tenant in possession, by name, informing him that he, Roe, was sued as a *casual ejector* only, and had no title to the premises, and would make no defence; and therefore advising him to appear in court, in the next Term, and defend his own title; otherwise he, Roe, would suffer judgment to be had against him, and thereby the party addressed would be turned out of possession.

On receipt of this friendly caution, if the tenant in possession did not in due time take the proper steps to be admitted defendant in the stead of Roe, he was supposed to have no right at all; and upon judgment being had against Roe, the casual ejector, the real tenant would be turned out of possession by the sheriff.

(*a*) As to a "declaration," vide sup. p. 500, n. (*c*).

(*b*) In Blackstone's time, it was held that the person stated in the declaration as plaintiff, must be a real person; (3 Bl. Com. p. 203;) but at a later period of the practice, he was always a nominal one.

In the next Term, however, after the service of the declaration, he had the opportunity of procuring himself to be made defendant; for in the course of that Term, the real claimant, now called the *lessor of the plaintiff*, moved the court in the name of Doe, the fictitious plaintiff, for a rule for *judgment against the casual ejector;* upon which motion, supported by an affidavit of the due service of the declaration, the court made a rule as of course for such judgment, unless the tenant should appear and plead to issue, within the time therein mentioned. And within that time the tenant in possession signed, (by his attorney,) what was called a *consent rule:* binding him to confess upon the trial of the cause that he was at the time of the declaration in possession of the premises therein mentioned, or part of them; and also to confess the *lease* made by the lessor of the plaintiff, as alleged in the declaration; the *entry* of the plaintiff as therein also stated; and, lastly, the *ouster* by himself the tenant in possession. And upon such consent rule being signed, the tenant in possession was allowed by the court to enter an appearance in his own name, and to plead the general issue, *not guilty.* After this, the issue was made up and sent down to trial, as in an action at the suit of Doe, plaintiff, on the demise of A. B. (the lessor of the plaintiff), against C. D. (the tenant in possession): and it is manifest,—that, under these circumstances, the matter to be tried, or real and substantial question in the cause, would turn merely upon a fourth point, viz. whether the lessor of the plaintiff had a good *title* to demise, on the day of the supposed demise stated in the declaration. The lessor of the plaintiff was bound to make out a clear title; otherwise his fictitious lessee could not obtain judgment to have possession of the land, for the term supposed to be granted. But if the lessor made out his title in a satisfactory manner, then judgment and a writ of possession was to go for John

Doe, the nominal plaintiff; who by this trial had proved the right of A. B. his supposed lessor.

It might happen, however, that the new defendant, after entering into the consent rule, failed to appear at the trial and to confess lease, entry and ouster. In that case the plaintiff Doe was of necessity nonsuited, for want of proving those requisites; but judgment would in the end be entered against the casual ejector Roe; and the sheriff, under a writ of execution on such judgment, would have turned out the tenant, and delivered the possession to the plaintiff. For the condition, on which the tenant in possession was admitted a defendant, was broken; and therefore the plaintiff was put again in the same situation as if no such defendant had been admitted at all; the consequence of which, we have seen, would have been that judgment would have been entered for the plaintiff against the casual ejector.

Such was the form of an ejectment, at the time of passing the Common Law Procedure Act, 1852 (*b*). Its form, as remodelled by that Act (15 & 16 Vict. c. 76), will appear from the following outline (*c*).

(*b*) It was by a gradual advance that the strange fictions above described obtained reception. Originally the claimant used to make a formal entry, in fact, upon the premises, and there sealed and delivered a lease to some other person, till a third, by a previous agreement, or otherwise, entered upon him and turned him out. An action was thereupon brought against the person last mentioned, or *casual ejector*, as he was called; of which, however, the practice required that notice should be given to the tenant in possession. But, inasmuch as great trouble, says Blackstone (vol. iii. p. 202), attended this actual making of the lease, entry and ouster, a new and more easy method, when there was any actual occupier of the premises, was invented by the Lord Chief Justice Rolle, who then sat in the Court of Upper Bench. This was the method just described in the text.

(*c*) The rules of procedure annexed to the Judicature Act, 1873, make no special mention of the action of ejectment; and it may be doubtful how far the practice as stated in the text will be retained, inasmuch as every action is to commence, apparently, by a writ of summons of a uniform kind.

A writ, in a prescribed form (*d*), is thereby directed to issue to the person or persons in possession, by name, and generally "to all persons entitled to defend the possession" of the premises therein described—setting forth that some person or persons, by name, claim to be entitled to the possession, and to eject all other persons—and commanding those to whom it is directed, or such of them as deny the alleged title, to appear in court, at a stated time, to defend the possession of the property, or such part of it as they shall think fit (*d*). It moreover contains a notice, that, in default of appearance, the defendants will be turned out of possession; and is endorsed with the name and abode of the solicitor by whom it is issued, or if there be none, with the name and residence of the plaintiff, in like manner as a writ of summons in an ordinary action (*e*).

This writ is served by delivering it personally to the tenant in possession, whether on the premises or elsewhere; or by delivering it personally, on the premises, to some member of his family or household: and in either case it should be read over, or its purport explained (*f*). But the manner of service may be varied, under special circumstances, by order of the court or a judge. And in the case of a vacant possession, the service is effected by posting a copy of the writ upon the door of the dwelling-house, or other conspicuous part of the property (*g*).

Not only the person to whom the writ is directed by name, but any other person also, (on filing an affidavit

(*d*) The form of writ will be found in the 15 & 16 Vict. c. 76, Sched. (A.), No. 13. Tenants in common may join in a single writ. (See Elliss *v.* Elliss, 1 Ell. Bl. & Ell. 81.)

(*e*) Sects. 168, 169.

(*f*) Sect. 170. By this section the writ is to be served in the same manner as a *declaration in ejectment* was theretofore served. This manner is described in the text. In Edwards *v.* Griffith, 15 C. B. 397, it was however considered doubtful if it was necessary to read over or explain the writ to the party served.

(*g*) Sect. 170.

showing that he or his tenant is in possession, and obtaining the leave of the court or a judge,) has been allowed to appear and defend (*h*). Supposing no appearance to be entered, the plaintiff,—for to simplify the matter we will suppose a single party on either side,—is at liberty to sign judgment for recovery of the possession (*i*); but on the opposite supposition, viz. that of an appearance, an issue is at once made up by the plaintiff, without any pleadings (*k*); setting forth the writ and the appearance of such a person named, and his defending for the premises,—or for a certain part of them, as the case may be (*l*). And upon the issue so made up, the parties may proceed to trial, according to the course of practice in other actions (*m*); and the question to be determined at the trial is, whether the statement in the writ, of the title of the claimant, be true or false (*n*). But in the particular case where the defendant claims to be joint-tenant, tenant in common, or co-parcener with the plaintiff, whose title he so far admits, but denies having ousted him, a notice should be given by the defendant to that effect; and such notice must be entered, (among the other proceedings,) in the issue made up. And the question for trial will then be two-fold—first, whether the defendant has in truth any such title as joint-tenant, or the like; and secondly, whether an actual ouster of the plaintiff has taken place (*o*).

(*h*) 15 & 16 Vict. c. 76, s. 172. See Whitworth *v.* Humphries, 5 H. & N. 185.

(*i*) Sect. 177. The form of the judgment will be found in Sched. (A.), No. 15.

(*k*) The term "issue" is here employed in its secondary sense of a transcript of the proceedings, as sup. p. 515. For as there is no pleading there can be no issue in the proper sense, as defined sup. p. 508.

(*l*) The form will be found in Sched. (A.), No. 16.

(*m*) Sect. 180. It may be remarked here that the statement in the text supposes that no *special case* has been stated by consent, so as to take the opinion of the court upon the facts, without proceeding to trial. But this may be done in ejectment, as in other actions. (Sect. 179.)

(*n*) Sect. 180.

(*o*) Sect. 189.

If, at the trial, the jury find for the plaintiff,—that is, find, (in the ordinary case,) that the statement in the writ of his being entitled to the possession, is true, or (in the case last supposed), that either the defendant is not such joint-tenant, or the like, or that though he is so, yet an actual ouster of the plaintiff has taken place,—judgment may be signed by the plaintiff, for the recovery of the premises, (or part of them, as the case may be,) with costs; and execution will issue accordingly;—under which possession will be delivered to him by the sheriff (*p*). But if the jury find for the defendant,—that is, find, (in the ordinary case,) that the statement in the writ that the plaintiff is entitled to the possession, is false, or, (in the other,) that the defendant was entitled as joint-tenant or the like, and that there has been no actual ouster of the plaintiff,—then the defendant will be entitled to sign judgment for his costs, and take out execution accordingly (*q*).

Upon the judgment, an appeal may be brought in the same manner as in other actions. But the defendant will be required, as the general rule, (as a condition for a stay of execution,) to give bond to his adversary, for payment of such costs and damages as shall be awarded after affirmance;—including such compensation for *mesne* (or intervening) profits taken, or waste committed since the judgment, as may be assessed under a writ of inquiry to be issued for the purpose (*r*).

To this sketch of the general course of the existing procedure in an ejectment in ordinary cases, we have only to add, that, in order to complete the remedy, recourse (except in actions between landlords and tenants) must be had, (according to the practice that has hitherto been pursued,) to another and supplementary action, viz. an ordi-

(*p*) 15 & 16 Vict. c. 76, ss. 185, 189.
(*q*) Sect. 186.
(*r*) Sect. 208.

nary action of trespass *quare clausum fregit*, to recover the mesne profits which the defendant has received during the period of his wrongful possession.

It still remains, however, to take notice of certain legislative provisions in favour of *landlords*, without which our general view of the proceedings in and connected with the action of ejectment is not complete (*t*).

And, first, to prevent fraudulent recoveries of the possession by collusion with the tenant of the land, it was enacted, by 15 & 16 Vict. c. 76, s. 209 (*u*), that all tenants shall, on pain of forfeiting three years' rent, give notice to their landlords of any writ in ejectment delivered to them, or coming to their knowledge; and, by 11 Geo. II. c. 19, s. 13, that any landlord, (a term which has been held to extend to the heir, remainderman, mortgagee, devisee in trust, and the like,) may, by leave of court, be made a co-defendant to the action, in case the tenant himself appears to it,—or, if he make default, may, by such leave, become sole defendant (*x*).

Secondly. It was the rule of the common law, that though there be a proviso for re-entry by the landlord,

(*t*) There are also provisions enabling a landlord in some cases to recover possession in a more summary method than by an action of ejectment, viz. by proceedings before magistrates or in the county court, where the tenant *deserts* the premises (leaving rent in arrear); or *holds over*, after his tenancy has determined by notice to quit or otherwise. (Vide sup. vol. I. pp. 294, 295.)

(*u*) This provision is a re-enactment of one to the same effect, contained in 11 Geo. 2, c. 19, s. 12.

(*x*) See also 15 & 16 Vict. c. 76, s. 172, and 36 & 37 Vict. c. 66, sched. r. 9. Blackstone says (vol. iii. p. 204), that long before the statute 11 Geo. 2, c. 19, the landlord had a similar right. And he also refers to the antient rule of law by which, if the tenant in a real action made default, the remainderman or reversioner had a right to come in and defend the possession. It is to be observed, that, under the present procedure, where the landlord defends, in respect of property whereof he is in possession only by his tenant, it should be stated in his appearance that he appears *as landlord*. (15 & 16 Vict. c. 76, s. 173.)

in the case of rent remaining in arrear, yet he could not have the benefit of that proviso, (unless it were accompanied by an express stipulation to that effect,) without making a formal demand upon the premises of the precise sum claimed, and at the precise time when it became due (*y*). But to obviate these niceties, it was provided by 15 & 16 Vict. c. 76, s. 210, (re-enacting in substance 4 Geo. II. c. 28, s. 2,) that, in all cases between landlord and tenant, if half-a-year's rent be in arrear (*z*), and there be a right to re-enter for the non-payment (*a*), and no sufficient distress be found (*b*), the landlord may serve a writ in ejectment for recovery of the demised premises; or in case the same cannot be legally served, or no tenant be in actual possession, may affix a copy of the writ upon the door, or if there be no messuage, then upon some notorious part of the premises; and that such service or affixing shall stand in the place of a demand and re-entry. A judgment and execution in such an ejectment has been held to be final and conclusive, unless the rent and full costs be paid or tendered within six calendar months afterwards; though, on the other hand, the defendant therein may be relieved from the effect thereof within such period, and on the above conditions (*c*).

Thirdly. It was enacted by 15 & 16 Vict. c. 76, s. 213, that where the interest of any tenant holding under lease or agreement in writing, for term of years certain, or from year to year, shall have expired or been determined by regular notice to quit, and, after lawful demand in writing served personally, or left at the tenant's usual place of abode, possession shall have been refused,—the

(*y*) See Duppa *v.* Mayo, 1 Saund. Wms. 287.

(*z*) See Gretton *v.* Roe, 4 C. B. 576.

(*a*) See Doe *v.* Bowditch, 8 Q. B. 973.

(*b*) See Doe *v.* Wandlass, 7 T. R. 117.

(*c*) The defendant has been entitled to this relief either by application to the court in which the action was brought, or to a court of equity. (See 4 Geo. 2, c. 28, ss. 3, 4; 15 & 16 Vict. c. 76, s. 212; 23 & 24 Vict. c. 126, s. 1; Doe *d.* Hitchins *v.* Lewis, 1 Burr. 619.)

landlord, at the foot of his writ in ejectment brought to recover the premises, might address a notice to the tenant, requiring him to find bail. And on the appearance of the tenant, and by order of the court or a judge, after hearing both parties, the tenant might be required to enter into a recognizance, with two sufficient sureties, to pay the costs and damages which should be recovered by the plaintiff. And on his failure to find such bail, the plaintiff should be entitled to sign judgment for recovery of the possession, with costs (*d*).

Lastly. It was provided by 15 & 16 Vict. c. 76, s. 214, that whenever it should appear in any ejectment *between landlord and tenant*, that such tenant or his attorney had been served with due notice of trial,—the judge before whom the cause is tried, whether the defendant should appear on the trial or not, should permit the claimant, after proof of his right, to go into evidence of the *mesne* profits thereof which had accrued from the time when the defendant's interest determined, down to the time of the trial; and the jury, finding for the claimant, should give their verdict on the whole matter, both as to recovery of possession and as to the amount of damages to be paid for such *mesne* profits (*e*).

(*d*) This provision is a re-enactment, in substance, of 1 Geo. 4, c. 87, s. 1. As to bail in such cases, see Doe *v.* Sharpley, 15 Mee. & W. 558; Doe *v.* Roe, 2 L., M. & P. 322; Doe *v.* Roe, 6 C. B. 272. As to the liability of the tenant so holding over to pay *double rent* under 4 Geo. 2, c. 28, s. 1, vide sup. vol. I. pp. 294, 295.

(*e*) See Smith *v.* Tett, 9 Exch. 307. The above provision is a re-enactment, in substance, of 1 Geo. 4, c. 87, s. 2.

CHAPTER XII.

OF MOTIONS AND PREROGATIVE WRITS.

WE have now taken a view of the existing method of proceeding in all actions which have been hitherto used in modern practice.

The law however affords, in certain cases of civil injury, other remedies, of a nature generically different from an action, and to these we propose to devote the following chapter. But as the proceedings in them are generally introduced by that kind of application to the court, which is technically called a *motion*, it will be proper to premise some explanation as to the nature of a motion in general. And here we shall confine ourselves to applications to the court itself, to which alone the name of motions is properly applied; not deeming it necessary to take any particular notice of such applications as are made *at chambers*, a branch of practice more summary in its nature than the former, and turning for the most part on matters of subordinate importance (*a*).

A motion, then, is an application made to a judge (or to the judges in banc) *vivâ voce*, in open court, and it may be either incidental to an action,—a relation in which we have already had occasion sometimes to refer to it,—or it may be wholly unconnected with that kind of remedy. It can be made by none but a barrister, to the exclusion of

(*a*) As to applications to a judge at chambers, see 11 Geo. 4 & 1 Will. 4, c. 70, s. 4, and 1 & 2 Vict. c. 45, s. 2; 15 & 16 Vict. c. 76, s. 52. It will be borne in mind by the reader that a great part of the business at one period transacted before a judge at chambers may now, under 30 & 31 Vict. c. 68, and the rules made thereunder, be disposed of by one of the *masters* of the courts. Vide sup. p. 341.

solicitors (*a*); and the practice requires that it should, in most cases, be supported by *affidavit* of the matter of fact on which it is founded (*b*). Its object, in a general point of view, is to obtain an order (or *rule*), directing some act to be done in favour of the applicant; which order or rule, when obtained, is served upon the party by whom the act is to be performed. The rule so moved for is *ex parte*, and is, in its form, usually a rule to *show cause*, (otherwise called a rule *nisi*,) commanding the party, on a certain day therein named, to show cause to the court why he should not perform the act, or submit to the terms therein set forth (*c*); but in some cases, where the right to the relief prayed for is very clear, it is a rule *absolute in the first instance*, commanding the thing to be done, without the appointment of any day to show

(*a*) On the other hand, a barrister has no exclusive audience at *chambers;* and, in practice, most of the ordinary summonses there returnable, are attended to by the solicitors or their clerks.

(*b*) *Affidavits* are made on various occasions in the course of judicial proceedings; and are sworn in court, or before some officer appointed to take affidavits in such court. It forms one of the rules of procedure annexed to the Judicature Act, 1873, that "upon any interlocutory application" evidence may be given by affidavit; but the court or a judge may, on the application of either party, order the attendance, for cross-examination, of the person by whom such affidavit is made. (36 & 37 Vict. c. 66, sched. r. 37.) It is also by the same rules provided, that affidavits shall be confined to such facts as the witness is able of his own knowledge to prove, except on interlocutory motions, on which statements as to his belief, with the grounds thereof, may be admitted. The costs of every affidavit which shall unnecessarily set forth matters of hearsay, or argumentative matter, or copies of or extracts from documents, are to be paid by the party filing the same (r. 38). It may be remarked here, that a practice formerly obtained of making *voluntary* affidavits, i. e. affidavits sworn before magistrates or others, in matters on which no judicial inquiry was pending; but by 5 & 6 Will. 4, c. 62, this practice was prohibited, and a form of *declaration* substituted for such voluntary affidavits. And it was provided that any person making such declaration falsely, shall be guilty of a misdemeanor.

(*c*) In the courts of *equity*, the practice on a motion has hitherto been to proceed, in the first instance, to a hearing of the parties on both sides; requiring, however, him by whom the motion is made, to give notice to his adversary of the nature and time of the intended application.

cause. Upon the day appointed by the rule *nisi*, the counsel for the party on whom it was served accordingly appears, and is heard in opposition to it; and, the counsel by whom it was moved having been afterwards heard in reply, the court either discharges the rule, or makes it absolute, as the case may be; and that upon the terms either that the costs of the application be paid by one of the parties to the other, or without costs, as may appear most just under the circumstances of the case. But if the party served with the rule fail to appear in opposition to it, it is made absolute as a matter of course. If made absolute, a new rule to that effect is then served on the party ruled; who is bound to obey it upon peril of being attached for contempt,—a course taken by the court in vindication of its own authority, and under which the party attached is liable to coercion by the arrest of his person.

We shall now commence the main subject of the chapter, viz. the consideration of certain remedies afforded in the courts, distinct, in their nature, from an action. These chiefly consist of what are called *prerogative writs:* which do not issue as of mere course, nor without showing some probable cause why the extraordinary powers of the Crown are called in to the party's assistance (*d*); and they are principally as follows:

I. The writ of *Procedendo.* This writ issues when the judge of any subordinate court doth delay the parties, for that he will not give judgment, either on the one side or the other, when he ought so to do (*e*). In such case a

(*d*) 3 Bl. Com. 132. In R. *v.* Cowle, Burr. 855, prerogative writs are also distinguished from writs *ministerially* directed, viz. those issued to the sheriff; the prerogative writs being generally directed, not to the sheriff or other minister of the court, but to the parties themselves whose acts are the subject of complaint.

(*e*) F. N. B. 153, 240. In such cases, however, the writ of *mandamus* (next to be considered) is a concurrent remedy, and one more frequently resorted to in practice. As to the writ of mandamus, vide post, p. 630.

procedendo ad judicium shall be awarded, commanding the inferior court, in the name of the Crown, to proceed to judgment. And upon further neglect or refusal, the judge of the inferior court may be punished for his contempt by writ of attachment, returnable in the superior court. A *procedendo* may also be awarded out of the superior court, where an action has been removed to it from an inferior court, and it appears to have been removed on insufficient grounds (*f*). And by 21 Jac. I. c. 23, a suit once so remanded, shall not be again removed, before judgment, into any court whatsoever.

II. The writ of *Mandamus.* In treating of this remedy we shall refer mainly, and in the first instance, to the common law or *prerogative* writ; though we shall add a few words as to a species of *mandamus* which was introduced by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), and which may be described as a *mandamus incidental to an action* (*g*).

1. Taking the term of *mandamus* in its first sense,—the power of issuing this species of the writ belongs exclusively to the Queen's Bench (*h*). [It is a high prerogative writ of a most extensive remedial nature: and is in its form a command issuing in the Queen's name, and directed to any person, corporation, or inferior court of judicature, within the Crown's dominions, requiring them to do some particular thing therein specified which appertains to their office and duty; and which the court has previously determined, or at least supposes, to be consonant

(*f*) See 21 Jac. 1, c. 23; Jac. Dict. *Procedendo;* Blanchard *v.* De la Crouée, 9 Q. B. 869; Garton *v.* Great Western Railway Company, 1 E. & E. 258.

(*g*) Even prior to this Act, there was, for one purpose, a *mandamus* auxiliary to an action, viz. the *mandamus* to examine witnesses in India and other British dominions in foreign parts. (See 13 Geo. 3, c. 63, s. 44, and 1 Will. 4, c. 22, s. 1.)

(*h*) From the commencement of the Judicature Act, 1873, on 2nd November, 1874, this jurisdiction will accordingly belong to the *Queen's Bench* division of the High Court of Justice thereby established. (36 & 37 Vict. c. 66, s. 34.)

[to right and justice. In its application, it may be considered as confined to cases where relief is required in respect of the infringement of some *public* right or duty (*i*), and where no effectual relief can be obtained in the ordinary course of an action (*k*). Such is the general principle; but as to the specific instances in which the writ will be granted, they are much too numerous for complete detail (*l*). We may remark, however, that (among other cases) this writ lies to compel the admission or restoration of the applicant to any office or franchise of a public nature, (whether spiritual or temporal,) to academical degrees, to the use of a meeting house, or the like. And that it will be also granted for the production, inspection, or delivery, of public books and papers; or to compel the surrender of the regalia of a corporation; or to oblige bodies corporate to affix their common seal; or to compel the holding of a court; or the proceeding to an election in corporate and other public offices (*m*). In addition to which, we may notice, as another important application of this writ, that it issues to the judges of inferior courts, commanding them to do justice according to the power of their office, whenever the same is delayed (*n*). For it is the peculiar

(*i*) R. *v.* Bank of England, 2 B. & Ald. 622.

(*k*) See R. *v.* Bishop of Chester, 1 T. R. 396; R. *v.* Archbishop of Canterbury, 8 East, 219; Ex parte Robins, 1 W. W. & H. 578; R. *v.* Nottingham Old Water Works Company, 6 A. & El. 355; R. *v.* Bristol Dock Company, 2 Q. B. 69; The Queen *v.* Lancashire and Yorkshire Railway Company, 1 Ell. & Bl. 228. It is no objection to granting a *mandamus*, that the party against whom the complaint is made may be proceeded against by *indictment*. R. *v.* Severn Railway Company, 2 B. & Ald. 646.

(*l*) A copious enumeration of them will be found in 1 Chit. Gen. Pr. of Law, 789. See also the cases of Ex parte Lee, Ell. Bl. & Ell. 863, and The Queen *v.* Southampton, 1 Ell. Bl. & S. 5.

(*m*) See 11 Geo. 1, c. 4; and 7 Will. 4 & 1 Vict. c. 78, s. 24; R. *v.* Mayor, &c. of London, 1 T. R. 146; R. *v.* Leyland, 3 M. & S. 184; R. *v.* Norwich, 1 B. & Adol. 310.

(*n*) It is provided, however, by 19 & 20 Vict. c. 108, s. 43 (amended by 21 & 22 Vict. c. 74, s. 4), as to the *County Courts*, that no mandamus shall henceforth issue to a judge or officer of any such court, for refusing

[business of the Queen's Bench to superintend inferior tribunals, and to enforce therein the due exercise of those judicial or ministerial powers with which the Crown or legislature have invested them; and this not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice.

This writ is granted on a suggestion, by the oath of the party injured, of his own right and the denial of justice elsewhere (*o*); whereupon, in order more fully to satisfy the court that there is a probable ground for such interposition, a rule is made,—except under particular circumstances, where a rule will be granted absolute in the first instance (*p*),—directing the party complained of to show cause why a writ of *mandamus* should not issue. And if he shows no sufficient cause, and does not submit without contest to the application, the writ itself is issued at first in the alternative, either to do this, or signify some reason to the contrary; to which a *return* or answer must be made at a certain day.

If the person to whom the writ is directed makes no return, he is punishable for his contempt by attachment. If, on the other hand, he makes a return, and it be found either insufficient in law, or false in fact, there then issues, in the second place, a *peremptory mandamus* to do the

to do any act relating to the duties of his office; but that application must be made to the superior court for a *rule to show cause* why such act should not be done. See also as to such refusal, by a *stipendiary* or other magistrate, 11 & 12 Vict. c. 44, s. 5; R. *v.* Ingham, 17 Q. B. 884; R. *v.* Paynter, 28 L. T. (Q. B.) 303; R. *v.* Dayman, 29 L. T. (Q. B.) 125.

(*o*) Unless there has been a distinct refusal to do that which it is the object of the *mandamus* to enforce, the writ will not be granted. (R. *v.* Brecknock, &c. Company, 3 A. & E. 217.)

(*p*) See R. *v.* Archdeacon of Lichfield, 5 Nev. & M. 42; Ex parte Penruddock, 1 Har. & W. 347; R. *v.* Fox, 2 Q. B. 246; R. *v.* Churchwardens of Manchester, 7 Dowl. 707. And see 6 & 7 Vict. c. 89, s. 5; 17 & 18 Vict. c. 125, s. 76, as to the notice of the application to be given, in cases affecting corporate offices, to the opposite party; and as to making the rule absolute in the first instance, if the court think fit; and as to the time at which the writ may be made returnable.

[thing absolutely; and to this no other return will be admitted but a certificate of perfect obedience and due execution of the writ (*q*).] The sufficiency of the return, in *point of law*, was formerly determined, unless a special argument were ordered, in a summary way upon motion; but as to the truth of its allegations *in point of fact*, it was a rule that this could not be investigated by any further proceeding on the *mandamus*;—the complaining party having no remedy in case the facts were untruly alleged, save that of an action on the case for a false return. And in such action, if he obtained a verdict, he recovered damages equivalent to the injury sustained, together with a peremptory *mandamus* to the defendant. But now by 1 Will. IV. c. 21, in all cases of *mandamus*, the return may be pleaded to or traversed by the prosecutor, and his antagonist may reply, take issue or demur, and the same proceedings may be had as if an action on the case had been brought for making a false return. So that now the writ of *mandamus* is, (from the period at least of its return,) assimilated to an action; and the more closely, because it is also provided, that the prosecutor, if successful, shall recover damages, and that the successful party shall in all cases, upon judgment after issue joined, or by default, be entitled to his costs (*r*). In addition to which, it was enacted by 6 & 7 Vict. c. 67, that a prosecutor objecting to the validity of the return, shall do so by way of demurrer to the same, in like manner as in an action; and thereupon the writ, return and demurrer shall be entered on record, and the court shall adjudge either that

(*q*) R. *v.* Ledgard, 1 Q. B. 616.

(*r*) As to the course of proceeding on *mandamus*, see R. *v.* Oundle, 1 A. & E. 283; R. *v.* Governors of Darlington School, 6 Q. B. 682; Ex parte Thompson, ibid. 721; Clarke *v.* Leicestershire and Northamptonshire Canal Company, ibid. 8 9 The Queen *v.* Ambergate Railway Company, 17 Q. B. 957. As to the *costs* of the application for the writ and the proceedings thereunder, see R. *v.* Oundle, ubi sup.; R. *v.* Eastern Counties Railway Company, 2 Q. B. 578; R. *v.* St. Pancras, 2 Dowl. N. S. 955; The Queen *v.* Ingham, 17 Q. B. 884.

the return is valid in law, or that it is not valid in law, or that the writ of *mandamus* itself is not valid in law. And if the court adjudge that the writ is valid, but the return invalid, it shall proceed to award a peremptory *mandamus;* and shall also, in any event, award costs to be paid to the successful party (*s*).

Besides these provisions, we may notice the enactment of 1 & 2 Will. IV. c. 58, s 8, intended to afford relief to officers and other persons to whom a writ of *mandamus* is directed to issue, commanding them to admit to offices, or to do or perform other matters in respect of which they claim no right or interest. It is provided in favour of such persons, that it shall be lawful for the court to which application is made for the writ to relieve them from the liabilities incident to the execution thereof, by calling upon any other person having or claiming any interest in the matter to appear and show cause against the issuing of the writ: and thereupon to make such rules and orders between all parties as the circumstances of the case may require.

2. As to the *mandamus* which we have described, as *incidental to an action*, it was introduced by "The Common Law Procedure Act, 1854," which provided that the plaintiff in any action, (except replevin and ejectment,) might endorse upon the writ of summons and the copy to be served a notice that the plaintiff intended to claim a writ of *mandamus* commanding the defendant to perform some duty in which the plaintiff was interested, and to enforce which there was no other remedy (*t*). And the plaintiff might accordingly make such claim afterwards in

(*s*) The provisions of the Common Law Procedure Acts, 1852 and 1854, are applied (so far as they are applicable) to the proceedings and pleadings upon a prerogative writ of *mandamus*. (17 & 18 Vict. c. 125, s. 77.)

(*t*) 17 & 18 Vict. c. 125, ss. 68—76. As to the cases in which this species of *mandamus* will lie, see Benson *v.* Paull, 6 Ell. & Bl. 378; Norris *v.* Irish Land Company, 8 Ell. & Bl. 512; Ward *v.* Lowndes, 1 E. & E. 940; Fotherby *v.* Metropolitan Railway Company, Law Rep., 2 C. P. 188; Bush *v.* Beavan, 1 Hurls. & C. 500.

the pleadings—either together with any other demand, or separately,—setting forth in his statement the grounds of his claim; and that though performance of the duty had been demanded, it had been neglected or refused. If judgment were given in such action that a *mandamus* should issue, the Act proceeded to direct that a peremptory writ of *mandamus*, (besides the ordinary execution proper to the action,) was to issue out of the court in which the action was brought, commanding the defendant forthwith to perform the duty; and, in case of disobedience, that it might be enforced by attachment. Or the court might, on application of the plaintiff, direct that the act should be done by the plaintiff, (or by some person appointed for the purpose by the court,) at the expense of the defendant.

It is apparently in reference to a *mandamus* of the species now under consideration, that the following provision has been inserted in the Judicature Act, 1873, viz., that a *mandamus* may be granted by an *interlocutory* order of the court in all cases in which it shall appear to the court to be just or convenient that such order should be made; and that any such order may be made either unconditionally, or upon such terms and conditions as the court shall think just (*u*).

III. The writ of *Prohibition* (*x*). [A prohibition is a writ directed to the judge and parties of a suit in any inferior court, commanding them to cease from the prosecution thereof,—upon a surmise either that the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court (*y*). This writ may issue to any species

(*u*) 36 & 37 Vict. c. 66, s. 25, subs. (8).

(*x*) As to prohibition, see the following cases:—Ex parte Tucker, in re Inman, 1 M. & Gr. 519; Tucker *v.* Tucker, 4 Man. & Gr. 1074; Hassach *v.* Cambridge University, 1 Q. B. 593; Re Dean of York, 7 Q. B. 1; Evans *v.* Gwynn, 5 Q. B. 844; Francis *v.* Steward, ibid. 984; De Haber *v.* Queen of Portugal, 21 L. J. (Q. B.) 488.

(*y*) Neither the Judicature Act, 1873, nor the rules of procedure thereto annexed, make mention of a prohibition.

[of inferior court, if it concerns itself with some matter not within its jurisdiction (*z*). It may likewise issue, if in handling matters clearly within its cognizance, such court should transgress the bounds prescribed to it by the laws of England (*a*); as where a spiritual court requires two witnesses to prove a release or payment of tithes (*b*), or the like (*c*). For as the fact of signing a release, or of actual payment, is not properly a spiritual question, but only allowed to be decided in such courts, because incident or accessory to some original question clearly within their jurisdiction, it ought therefore, where the two laws differ, to be decided not according to the spiritual, but the temporal law; else the same question might be determined different ways according to the court in which the suit is depending; an impropriety which no wise government can or ought to endure, and which is therefore a ground of prohibition (*d*).]

A short summary of the method of proceeding in prohibition is as follows. The party aggrieved in the court

(*z*) 3 Bl. Com. p. 112. As to the writ of prohibition to a *county court*, see 13 & 14 Vict. c. 61, s. 22; 19 & 20 Vict. c. 108, ss. 40—42, 44; Toft *v.* Rayner, 5 C. B. 162; Ellis *v.* Watt, 8 C. B. 614; Kerkin *v.* Kerkin, 2 Ell. & Bl. 399; Chivers *v.* Savage, 5 Ell. & Bl. 697; Hunt *v.* The South Staffordshire Railway Company, 2 Hurl. & N. 451.

(*a*) If sentence has been given in the court below, the superior court will presume that there was no excess of jurisdiction, unless such excess be distinctly proved, or be apparent on the face of the proceedings. (See Hart *v.* Marsh, 5 Ad. & Ell. 591.)

(*b*) Mallary *v.* Marriott, Cro. Eliz. 667; Hob. 188.

(*c*) A prohibition will not be awarded in reference to a mere point of *practice*, where the court has jurisdiction on the general subject of the cause. (See Ex parte Smyth, 1 Tyr. & G. 227; Jolly *v.* Baines, 12 Ad. & El. 201; Ex parte Story, 12 C. B. 767.) Nor will it, as the general rule, issue at the instance of a *stranger* to the suit below. (See The Queen *v.* Twiss, Law Rep., 4 Q. B. 407.)

(*d*) So long as the idea continued among the clergy, that the ecclesiastical state was wholly independent of the civil, great struggles were constantly maintained between the temporal courts and the spiritual, concerning the writ of prohibition and the proper objects of it. Even from the time of the constitutions of Clarendon, made in opposition to the claims of Archbishop à Becket, in 10 Hen. 2, to the exhibition of certain articles of complaint to the king, by Archbishop Bancroft, in the third

below applies to the superior court, setting forth the nature and cause of his complaint, in being drawn *ad aliud examen*, by a jurisdiction or manner of process disallowed by the laws of the kingdom. And this used formerly to be done by filing, as of record, a *suggestion*, containing a formal state of the facts; but by 1 Will. IV. c. 21, it was provided, that it shall not be necessary to file any suggestion, but that an application for a writ of prohibition may be made by *affidavits* only, that is, in the way of an ordinary motion for a rule to show cause; upon which, if the matter alleged appear to the court, upon the showing cause, to be sufficient, the writ of prohibition immediately issues, commanding the judge not to hold, and the party not to prosecute, the plea. But sometimes the point may be too nice and doubtful to be decided merely upon a motion; and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to *declare* in prohibition (*e*); that is, to deliver a statement, setting forth, in a concise manner, so much of the proceeding in the court below, as may be necessary to show the ground of the application, and praying that a writ of prohibition may issue (*f*). And this used formerly to be connected with an allegation that the party sued on behalf of the Crown as well as of himself; and with a supposition or fiction—which was not traversable—that the defendant had proceeded in the suit below, notwithstanding a writ of

year of James the first, on behalf of the ecclesiastical courts. From which articles, and from the answers to them signed by all the judges of Westminster Hall, much may be collected concerning the reasons of granting, and methods of proceeding upon, prohibitions. (3 Bl. Com. p. 112.)

(*e*) A declaration in prohibition will always be directed, on the application of the person against whom the prohibition is sought. (Remington *v.* Dolby, 9 Q. B. 176.) With respect, however, to applications for a writ of prohibition to a *County Court*, it was provided by 19 & 20 Vict. c. 108, s. 42, that the matter shall be finally disposed of by rule or order; and that no declaration, or further proceedings in prohibition, be allowed.

(*f*) 1 Will. 4, c. 21, s. 1.

prohibition (*g*). But by the same statute just mentioned, the use of these forms was expressly abolished. And it is provided, that to the above statement the defendant may demur, or plead such matter, by way of traverse or otherwise, as may be proper to show that the writ ought not to issue, and shall conclude by praying that such writ may not issue—that judgment shall be given that the writ of prohibition do or do not issue, as justice may require—and that the party in whose favour judgment shall be given (whether on nonsuit, verdict, demurrer, or otherwise) shall be entitled to the costs attending the application and subsequent proceedings, and have judgment to recover the same (*h*). And, further, that, in case a verdict shall be given for the plaintiff, it shall be lawful for the jury to assess damages, for which judgment shall also be given; but that such assessment shall not be necessary to entitle the plaintiff to costs (*i*). The effect of the legislative provisions here cited has consequently been to place prohibitions, after a rule to declare has been obtained, substantially upon the footing of an action; and in this respect it exhibits a close resemblance to a mandamus (*k*). After a writ of prohibition has been issued, if either the judge of the court below, or a party, shall proceed in disobedience to it, an attachment may be had against them to punish them for the contempt, at the discretion of the superior court; and an action will also lie against them to give satisfaction, by way of damages, to the injured party (*l*).

IV. Another remedy (now fallen into disuse) analogous to those already mentioned, was the writ of *Quo warranto*. This writ was in the nature of a writ of right for the Crown, against him who claimed or usurped any

(*g*) Barn. Not. 4to. 148.

(*h*) See Ex parte Overseers of Everton, Law Rep., 6 C. P. 245.

(*i*) See White *v.* Steele, 13 C. B. 231.

(*k*) Vide sup. p. 630.

(*l*) F. N. B. 40; 2 Inst. 601—618.

office, franchise, or liberty,—to inquire, in order to determine the right, by what authority he supported his claim (*m*). It lay also in case of non-user or long neglect of a franchise, or mis-user or abuse of it; being a writ commanding the defendant to show by what warrant he exercised such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. The writ of *quo warranto* was originally returnable before the king's justices at Westminster (*n*); but afterwards, by virtue of the statutes of *quo warranto* (6 Edw. I. c. 1, and 18 Edw. I. st. 2), only before the justices in eyre. But after those justices gave place to temporary commissioners of assize,—the judges on the several circuits,—this branch of those statutes lost its effect. And writs of *quo warranto*, if brought at all, were (as before) prosecuted and determined before the king's justices at Westminster. And in case of judgment for the defendant, he had an allowance of his franchise; but in case of judgment for the Crown, —for that the party is entitled to no such franchise, or hath disused or abused it,—the franchise was either seized into the sovereign's hands, to be granted out again to whomsoever he should please; or, if it were not such a franchise as might subsist in the hands of the Crown, there was merely judgment of *ouster*, to turn out the party who usurped it (*o*).

[The judgment on a writ of *quo warranto*, (being in the nature of a writ of right,) was final and conclusive even against the Crown: and this, together with the length of its process, probably occasioned that disuse into which it has now fallen; and introduced the modern method of prosecution in similar cases, by *information* filed in the Queen's Bench by the attorney-general, in the nature of a writ of *quo warranto*;—wherein the process is speedier, and the judgment not quite so decisive (*p*).

(*m*) Finch, L. 322; 2 Inst. 282.

(*n*) Old Nat. Brev. fol. 107, edit. 1534.

(*o*) 2 Inst. 498; Rast. Entr. 540; R. *v.* Stanton, Cro. Jac. 259; R. *v.* Mayor of London, 1 Show. 280.

(*p*) Under the Judicature Act, 1873, such informations will accord-

[This is properly a *criminal* method of prosecution, to punish the usurper by a fine for the usurpation of the franchise, as well as to oust him or seize it for the Crown (*q*). But it hath long been applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor (*r*); the fine being nominal only (*s*). It is therefore considered in modern practice as merely a civil proceeding (*t*).

ingly be assigned to the Queen's Bench division of the High Court of Justice by that Act established. (36 & 37 Vict. c. 66, s. 34.)

(*q*) During the violent proceedings that took place in the latter end of the reign of King Charles the second, it was, among other things, thought expedient to new-model most of the corporation towns in the kingdom. For which purposes many of those bodies were persuaded to surrender their charters; and informations in the nature of *quo warranto* were brought against others, upon a supposed, or frequently a real, forfeiture of their franchises by neglect or abuse of them. And the consequence was, that the liberties of most of them were seized into the hands of the king, who granted them fresh charters, with such alterations as were thought expedient; and, during their state of anarchy, the Crown named all their magistrates. This exertion of power, though perhaps *in summo jure* it was for the most part strictly legal, gave a great and just alarm; the new-modelling of all corporations being a very large stride towards establishing arbitrary power. And therefore it was thought necessary, at the Revolution, to bridle this branch of the prerogative, at least so far as regarded the metropolis, by statute 2 W. & M. c. 8; which enacts, that the franchises of the city of London shall never hereafter be seized or forejudged for any forfeiture or misdemeanor whatsoever. (3 Bl. Com. pp. 263, 264.)

(*r*) It is discretionary, however, in the court to grant or withhold a *quo warranto* information in such cases. (R. *v.* Parry, 6 Ad. & El. 810.)

(*s*) See the difference in the application of *mandamus* and *quo warranto* illustrated in the cases of R. *v.* Oxford, 6 Ad. & El. 349; R. *v.* Winchester, 7 Ad. & El. 215; R. *v.* Phippen, ibid. 970. After an office is determined, an information in *quo warranto* to try the title thereto will not be granted. (Re Harris, 6 Ad. & El. 475.) An information in *quo warranto* does not lie for exercising the office of guardian to a poor law union. (Re Aston Union, ibid. 784.) But it lies in respect to the office of clerk to a board of guardians appointed by statute. (Queen *v.* St. Martin's in the Fields, 17 Q. B. 149.) It does not lie in respect of the office of clerk to the justices of a borough. (The Queen *v.* Fox, 8 Ell. & Bl. 939.)

(*t*) 4 Bl. Com. 312. In virtue of its being considered as a civil proceeding, the court will grant a new trial, though the verdict should have been for defendant. (R. *v.*

[This proceeding is (by virtue of 9 Anne, c. 20) now applied as between party and party, without any intervention of the prerogative; for that statute permits an information in the nature of *quo warranto* to be brought with leave of the court, at the relation of any person desiring to prosecute the same,—who is then styled the *relator* (*u*),—against any person usurping, intruding into, or unlawfully holding any franchise, or office, in any city, borough, or town corporate (*x*). The same Act provides for the speedy determination of such information; and directs that if the defendant be convicted, judgment of ouster, (as well as a fine,) may be given against him; and that the relator shall pay or receive costs according to the event of the suit (*y*).] By the 32 Geo. III. c. 58, it was also provided that the defendant might state by way of defence to any information in *quo warranto* in respect of any office in a town corporate, (whether exhibited by leave of the court, or by the attorney-general on behalf of the Crown,) that he first took upon himself such office, six years or more before the information was exhibited; and that such defence might be pleaded with any other that the court might allow, and might be met by a reply that a forfeiture of such office had happened within such period of limitation. And it was further provided,

Francis, 2 T. R. 484.) It has been held that the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), has no application to an information in *quo warranto*. (Reg. *v.* Seale, 5 Ell. & Bl. 1.) No special reference to this proceeding occurs in the Judicature Act, 1873, or in the rules of procedure thereto annexed.

(*u*) It has been the practice that no rule will be granted for filing any information in the nature of a *quo warranto*, unless, at the time of moving, an affidavit be produced, by which some person or persons shall depose, that such motion is made at his or their instance, as relator or relators. (See R. *v.* Hedges, 11 Ad. & El. 163; R. *v.* Anderson, 2 Q. B. 740.) As to who may be relator, see R. *v.* Parry, 6 Ad. & El. 810; R. *v.* Greene, 2 Q. B. 460.

(*x*) An information in *quo warranto* cannot be brought against a company of persons, for acting as a corporation, unless at the instance of the attorney-general. (R. *v.* White, 5 Ad. & El. 613.)

(*y*) Lloyd *v.* The Queen, 2 B. & Smith, 656. See, however, 36 & 37

that the title of the defendant derived under any election should not be affected on account of defect of the title in the person electing,—provided the elector had been in the exercise *de facto* of his office, six years previous to the information. And by later statutes, 7 Will. IV. & 1 Vict. c. 78 and 6 & 7 Vict. c. 89, it was further enacted, that every application to the Queen's Bench, for the purpose of calling upon any person to show by what warrant he claims to exercise the office of mayor, alderman, or burgess, in any borough within the Municipal Corporations Act, must be made before the end of twelve months after the election of the defendant, or the time when he shall become disqualified;—that no election of any mayor shall be liable to be questioned by reason of a defect in the title of such person to the office of alderman or councillor to which he may have been previously elected, unless application shall have been made to the Queen's Bench, calling upon such person to show cause by what warrant he claims to exercise such office of alderman or councillor, within twelve months after his election thereto;—and that every election to the office of mayor, alderman, councillor, or other corporate office within any of the said boroughs, which shall not have been called in question within twelve months after such election, shall be deemed good and valid.

V. The writ of *Habeas Corpus*. This is the most celebrated writ in the English law, and the great remedy which it has provided for the violation of the right of personal liberty (*a*). We had occasion, in the first

Vict. c. 66, sched. r. 47, cited sup. p. 608, n. (*l*).

(*a*) Blackstone notices, (vol. iii. p. 128,) three other writs for removing the injury of false imprisonment: 1st, The writ of *mainprize, manucaptio*, commanding the sheriff to take sureties for the appearance of the prisoner, usually called *mainpernors*, and to set him at large; 2nd, the writ *de odio et atiâ*, commanding the sheriff to inquire whether a prisoner charged with murder was committed on general cause of suspicion, or merely *propter odium et atiam*, for hatred

volume, to make some remarks upon this writ, but a more particular detail of its history, and the practice connected with it, may here be acceptable (*b*).

The most important species of habeas corpus is that of *habeas corpus ad subjiciendum;* which is the remedy used for the deliverance from illegal confinement (*c*). This is directed to any person who detains another in custody; and commands him to produce the body, with the day and cause of his caption and detention, *ad faciendum, subjiciendum et recipiendum*,—to do, submit to, and receive whatsoever the judge or court awarding such writ, shall consider in that behalf (*d*). This is a high pre-

and ill will,—with the view, if the latter was found the case, of afterwards issuing another writ to admit him to bail; and 3rdly, The writ *de homine replegiando*, commanding the sheriff to replevy a man out of custody in the same manner that chattels taken in distress may be replevied, upon security given that he shall answer any charge against him. All these remedies however have long fallen into complete disuse.

(*b*) Vide sup. vol. I. p. 145.

(*c*) There are other kinds of the writ of habeas corpus mentioned in the books. Thus—1. The *habeas corpus ad respondendum* to bring up a prisoner confined by the process of an inferior court, to charge him with a fresh action in the court above. 2. *Ad satisfaciendum*, with a similar object when *judgment* in the inferior court has been had against the prisoner. 3. *Ad faciendum et recipiendum* (otherwise called a *habeas corpus cum causâ*), when, in an action in the inferior court, the defendant had been arrested, to remove the proceedings and bring up the body of the defendant to the court above, to "do and receive what the king's court shall deliver in that behalf." 4. *Ad prosequendum, testificandum, deliberandum*, &c., when a prisoner has to be brought up to bear testimony in any court, or to be tried in the proper jurisdiction. But the present law of arrest for debt has greatly lessened the importance of all these species except the last; and with regard to the last, the occasions for its use have been diminished by 16 & 17 Vict. c. 30, s. 9, and 19 & 20 Vict. c. 108, s. 31, allowing prisoners to be brought up as witnesses without a *habeas*, by order of the judge or of a secretary of state; and by 30 & 31 Vict. c. 35, s. 10, making an analogous provision with regard to the removal of prisoners from gaol in order to take their trial.

(*d*) State Trials, viii. 142. As to the writ of *habeas corpus ad subjiciendum, &c.*, see R. *v.* Greenhill, 4 Ad. & El. 624; Easton's case, 12 Ad. & El. 645; R. *v.* Batcheldor, 1 Per. & D. 516; S. C. nom. Leonard Watson's case, 9 Ad. & El. 781; Ford *v.* Nassan, 1 Dowl. N. S. 631; In re Parker, 5 Mee. & W. 32; Jones

rogative writ, which existed at common law, though it has been improved, as we shall presently see, by statute (*e*). And it runs into all parts of the dominions of the Crown (*f*). It has, however, been recently enacted, by 25 & 26 Vict. c. 20, that no writ of habeas corpus shall issue out of England, by authority of any judge or court therein, into any colony or foreign dominion of the Crown, where her Majesty has a lawfully established court with authority to grant and issue such writ, and with power to ensure its due execution throughout such colony or dominion (*g*). The writ will only issue after motion to the court, or application to a judge, (as the case may be,) supported by affidavit of the facts, and after a rule or order made thereon (*h*). [For, as was argued by Lord Chief Justice Vaughan, "it is granted on motion, because it cannot be had of course; and therefore there is no *necessity* to grant it, for the court ought to be satisfied that the party hath a probable cause to be delivered" (*i*). And this seems the more reasonable, because (when once granted) the person to whom it is directed can return no satisfactory excuse for not bringing up the body of the prisoner (*k*). So that if it issued of mere course, without showing to the court or judge some reasonable ground for awarding it, a traitor or felon under sentence of death, a soldier or mariner in the king's service, a wife, a child, a

v. Danvers, ibid. 234; Carus Wilson's case, 7 Q. B. 984; Queen *v.* Brenan, 16 L. J. (Q. B.) 289; In re Dunn, 17 L. J. (Q. B.) 97; Re Andrews, 4 C. B. 226.

(*e*) See Bl. Com. vol. iii. p. 137.

(*f*) As to *Jersey*, *Guernsey*, &c., see Carus Wilson's case, 7 Q. B. 984; Queen *v.* Brenan, 16 L. J. (Q. B.) 289.

(*g*) Shortly before the passing of this Act, the Court of Queen's Bench had issued a *habeas corpus* to the courts in Canada, requiring them to return the body of *John Anderson*, (a fugitive slave from an American slave state,) held by them in their custody, that he might be dealt with in this country. (See John Anderson's case, 16 L. J., Q. B. 129.) The statute mentioned in the text does not extend to the *Isle of Man*. (Ex parte Brown, 2 Best & S. 280.)

(*h*) Hobhouse's case, 3 B. & Ald. 420.

(*i*) Bushel's case, 2 Jon. 13.

(*k*) Bourn's case, Cro. Jac. 543.

[relation, or a domestic confined for insanity, or other prudential reasons, might obtain a temporary enlargement by suing out a *habeas corpus*, though sure to be remanded as soon as brought up to the court.

And therefore Sir Edward Coke, when chief justice, did not scruple in the thirteenth year of James the first, to deny a *habeas corpus* to one confined by the Court of Admiralty for piracy; there appearing, upon his own showing, sufficient grounds to confine him (*l*). On the other hand, if a probable ground be shown that the party is imprisoned without just cause, and therefore hath a right to be delivered, the writ of *habeas corpus* is then a writ of right, which may not be denied;—but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by command of the king, privy council, or any other (*m*).

In a former part of these Commentaries, we expatiated at large on the personal liberty of the subject (*n*). This was shown to be a natural inherent right, which cannot be surrendered or forfeited, unless by the commission of some great and atrocious crime; and which ought not to be abridged, in any case, without the special permission of law. A doctrine coeval with the first rudiments of the English constitution; and handed down to us from our Saxon ancestors, notwithstanding all their struggles with the Danes, and the violence of the Norman conquest; asserted afterwards and confirmed by the Conqueror himself and his descendants; and though sometimes a little impaired by the ferocity of the times, and the occasional despotism of jealous or usurping princes, yet established on the firmest basis by the provisions of *Magna Charta*, and a long succession of statutes enacted under Edward the third. To assert an absolute exemption from imprisonment in all cases, is inconsistent

(*l*) R. *v.* Marsh, 3 Bulstr. 27; see also White *v.* Wiltshire, 2 Roll. Rep. 138.

(*m*) 2 Inst. 615. See Com. Journ. 1 Apr. 1628.

(*n*) Vide sup. vol. I. p. 145.

[with every idea of law and political society; and in the end would destroy all civil liberty, by rendering its protection impossible; but the glory of the English law consists in clearly defining the times, the causes, and the extent, when, wherefore, and to what degree, the imprisonment of the subject may be lawful.

This it is which induces the absolute necessity of expressing, upon every commitment, the reason for which it is made, that the court, upon a *habeas corpus*, may examine into its validity; and, according to the circumstances of the case, may discharge, admit to bail, or remand, the prisoner.

And yet early in the reign of Charles the first, the Court of King's Bench, relying on some arbitrary precedents (and those, perhaps, misunderstood), determined that they could not, upon a *habeas corpus*, either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king, or by the lords of the privy council (*o*). This drew on a parliamentary inquiry, and produced the *Petition of Right*, in the third year of Charles the first, which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained. But when in the following year Mr. Selden and others were committed by the lords of the council in pursuance of his majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two terms, (including also the long vacation,) to deliver an opinion how far such a charge was bailable. And even when at length they agreed that it was, they annexed a condition of finding sureties for the good behaviour, which still protracted their imprisonment (*p*).

(*o*) State Trials, vii. 136.

(*p*) Blackstone remarks (vol. iii. p. 134,) that Sir Nicholas Hyde, chief justice, also said on that occasion (see State Trials, vii. 240), that "if "they were again remanded for that "cause, perhaps the court would "not afterwards grant a *habeas*

[The difficulties thus allowed to impede the application of the writ, gave rise to the statute 16 Car. I. c. 10, s. 8; whereby it is enacted that if any person be committed, though by the king himself in person, or by the privy council, or by any of the members thereof, he shall have granted unto him, without any delay upon any pretence whatsoever, a writ of *habeas corpus*, upon demand or motion made to the Court of King's Bench or Common Pleas: who shall thereupon, within three court days after the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain, in delivering, bailing, or remanding such prisoner. Yet still in the case of Jenks, who in 1676 was committed by the king in council for a turbulent speech at Guildhall, new impediments were permitted to delay the release of the party imprisoned (*q*); the chief justice (as well as the chancellor) declining to award a writ of *habeas corpus ad subjiciendum* in vacation, though at last he thought proper to award the usual writs *ad deliberandum*, *&c.*, whereby the prisoner was discharged at the Old Bailey (*r*). Other abuses had also crept into daily practice, which had in some measure defeated the benefit of this great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries*, were issued, before he produced the party; and many other vexatious shifts were practised to detain state prisoners in custody. These abuses at length gave birth to the famous

" *corpus*, being already made ac- " quainted with the cause of the im- " prisonment." He adds that this was heard with indignation and astonishment by every lawyer present, according to Mr. Selden's own account of it, whose indignation was not cooled at the distance of four and twenty years. (See Vindic. Mar. Claus. edit. A.D. 1653.)

(*q*) State Trials, vii. 471. The expression of Blackstone is, that "new " shifts and devices were made use " of to prevent his enlargement by " law." But there is perhaps no ground for imputing intentional oppression.

(*r*) See Crowley's case, 2 Swanst. 1.

[*Habeas Corpus* Act, 31 Car. II. c. 2, which is frequently considered as another *Magna Charta* of the kingdom; and by consequence and analogy has also, in subsequent times, reduced the general method of proceeding on these writs, (though not within the reach of that statute, but issuing merely at the common law,) to the true standard of law and liberty (*s*).

The statute itself enacts, 1. That on complaint and request in writing by or on behalf of any person committed and charged with any *crime*,—unless for treason or felony expressed in the warrant of committal; or as accessory, or on suspicion of being accessory, before the fact, to any petit-treason or felony; or upon suspicion of such petit-treason or felony, plainly expressed in the warrant; or unless he is convicted or charged in execution by legal process,—the lord chancellor or any of the judges, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a *habeas corpus* for such prisoner, returnable immediately before himself or any other of the judges. And, upon the return made, shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature. 2. That such writs shall be endorsed as granted in pursuance of this Act, and signed

(*s*) Mr. Christian, in his edition of Blackstone, quotes from Burnet's Hist. Car. II., a circumstance respecting the *Habeas Corpus* Act, which is more curious than creditable; and though we cannot be induced to suppose that this important statute was obtained by a jest and a fraud, yet the story proves that a very formidable opposition was made to it at that time. "It was carried," (says Burnet, vol. i. p. 485) "by an odd artifice in the House "of Lords. Lord Grey and Lord "Norris were named to be the "tellers; Lord Norris, being a man "subject to vapours, was not at all "times attentive to what he was "doing, so a very fat lord coming "in, Lord Grey counted him for "ten, as a jest at first, but seeing "Lord Norris had not observed it, "he went on with his mis-reckoning "of ten; so it was reported to the "House, and declared that they "who were for the bill, were the "majority; though it indeed went "on the other side; and by this "means the bill past."

[by the person awarding them. 3. That the writ shall be returned and the prisoner brought up, within a limited time according to the distance, not exceeding in any case twenty days. 4. That any officer or keeper neglecting to make due return, or not delivering to the prisoner or his agent within six hours after demand, a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another, without sufficient reason or authority, (as specified in the Act,) shall for the first offence forfeit 100*l.*, and for the second offence 200*l.*, to the party grieved, and be disabled to hold his office (*t*). 5. That no person, once delivered by *habeas corpus*, shall be re-committed for the same offence, on penalty of 500*l.* 6. That every person committed for treason or felony, shall, if he requires it, the first week of the next Term, or the first day of the next session of *oyer* and *terminer*, be indicted in that Term or session, or else admitted to bail—unless the witnesses for the Crown cannot be produced at that time. And that if acquitted, or if not indicted and tried in the second Term or session, he shall be discharged from his imprisonment for such imputed offence. But that no person, after the assizes shall be open for the county in which he is detained, shall be removed by *habeas corpus*, till after the assizes are ended; but shall be left to the justice of the judges of assizes. 7. That any such prisoner may move for and obtain his *habeas corpus*, and the lord chancellor or judges denying the same, on sight of the warrant, or upon oath made that the same is refused, shall forfeit severally, to the party grieved, the sum of 500*l.* 8. That this writ of *habeas corpus* shall run into the counties palatine,

(*t*) A person, sent over from Ireland under a warrant from the secretary of state for Ireland, charged with any offence, and committed to prison until he can be brought before a judge, is entitled to a copy of the warrant, under the *Habeas Corpus* Act, after it has been demanded. (Sedley *v.* Arbouin, 3 Esp. 174.)

[cinque ports, and other privileged places, and the islands of Jersey and Guernsey (*u*).]

This is the substance of this great and important statute; which extends (we may observe) only to the case of such commitments, as can produce no inconvenience to public justice by a temporary enlargement of the prisoner: all other cases of unjust imprisonment being left, by that statute, to the *habeas corpus* at common law (*x*). But, at a later period, in order to render the common law writ more effectual in cases not within the operation of the Act of Charles the second, it was provided by 56 Geo. III. c. 100—1. That where any person shall be restrained of his liberty, (other than for some criminal or supposed criminal matter, and except persons imprisoned for debt, or by process in any civil suit,) any one of the judges of the superior courts of common law may, upon *affidavit* showing a probable and reasonable ground for complaint, award the writ in time of vacation directed to the person in whose custody the party is confined; which shall be made returnable immediately before himself, or any other judge. 2. That upon disobedience to the writ, the judge before whom it is returnable may issue a warrant to arrest the party guilty of such contempt. 3. That if the writ shall be awarded so late in vacation that it cannot be conveniently obeyed during vacation, the same may be made returnable in the court to which the judge by whom it is awarded belongs, on a certain day in the next Term (*y*). 4. That if such writ shall be awarded so late that it cannot be conveniently obeyed during the Term, the same

(*u*) See Carus Wilson's case, 7 Q. B. 984; The Queen *v.* Brenan, 16 L. J., Q. B. 289.

(*x*) "Even upon writs of *habeas* "*corpus* at the common law, it is "now expected by the court, agreeable to ancient precedents and "the spirit of the Act of parliament, that the writ should be *immediately* obeyed, without waiting for any *alias* or *pluries*; "otherwise an attachment will issue." (3 Bl. Com. p. 137. And see R. *v.* Cowle, 2 Burr. 586.)

(*y*) See, however, the provision in the Judicature Act, 1873, with respect to Terms, mentioned sup. p. 486.

may be made returnable in the then next vacation before any of the judges. 5. That though the return to the writ may be good in law, it shall be lawful for the judge before whom it is returnable, to proceed to examine into the truth of the facts—and if it appears doubtful to him whether they be true or not, it shall be lawful for such judge to let to bail the person so confined, upon his entering into a recognizance to appear in court in the Term following; which court may then proceed to examine into the truth of the facts in a summary way by *affidavit*, and to order and determine as to the discharge, bailing, or remanding of the party. 6. That the like proceeding for controverting the truth of the return may be had in the case where the writ shall be awarded by the court itself, or be returnable therein. 7. That the several provisions aforesaid shall extend to all writs of *habeas corpus*, awarded in pursuance of the Act of the thirty-first year of Charles the second. And, 8. That a *habeas corpus*, issued under the Act of 56 Geo. III. c. 100, may run into any county palatine or cinque port, or other privileged place; or to the islands of Jersey, Guernsey, and Man; or to any port, harbour, road, creek, or bay, upon the coast of England or Wales, lying out of the body of any county (*z*).

[By which admirable regulations the remedy seems now to be complete for removing the injury of illegal confinement, a remedy the more necessary because the oppression does not always arise from the ill nature, but sometimes from the mere inattention of government. For it frequently happens in foreign countries, (and has happened in England during the temporary suspension of the statute,) that persons apprehended upon suspicion have suffered a long imprisonment, merely because they were forgotten (*a*).]

(*z*) See Carus Wilson's case, 7 Q. B. 984; The Queen *v.* Brenan, 16 L. J., Q. B. 289.

(*a*) See 3 Bl. Com. p. 133.

VI. The writ of *Certiorari.* This writ is directed in the queen's name to the judge or officers of any inferior court of record, commanding them to return the proceedings of a cause therein depending, to the end that the applicant may have the more sure and speedy justice (*d*). This writ may be had not only in civil but also in criminal cases. For in these the Queen's Bench has a general superintendence over all inferior courts, and may remove the indictments or other proceedings therein depending, and transfer them to its own jurisdiction. But the consideration of this use of the writ, belongs more properly to the next Book of these Commentaries (*e*): and our attention is at present called to its application in civil cases only; where its object is to obtain relief from some inconvenience supposed, in the particular case, to arise from a cause being disposed of before an inferior jurisdiction, less capable than the superior court of rendering complete and effectual justice.

Unless restrained by the enactments of some statute, the writ may in any case be applied for to one of the judges of the superior court, on the ground that difficult questions of law are likely to arise on the trial of the cause (*f*); or (where the cause is to be tried before a jury) that no impartial jury can be obtained within the local limits of the inferior court (*g*). But the writ will not issue as a matter of course; and with regard, in particular, to the *county courts* it has been provided by 9 & 10 Vict. c. 95, s. 90, and 19 & 20 Vict. c. 108, s. 38, that for a claim not exceeding *5l.* the writ of certiorari shall only issue if the superior court or judge shall deem it desirable that the cause shall be tried in the superior court; and provided the applicant shall give security for the amount of the claim and the costs of the trial, not

(*d*) Bac. Abr. Certiorari A. As to courts *not* of record, see Ex parte Phillips, 2 Ad. & El. 586.

(*e*) Vide post, bk. VI. c. XIX.

(*f*) See Hunt v. The Great Northern Rail. Co., 2 L. M. & P. 268.

(*g*) See Symonds v. Dimsdale, 2 Exch. 523.

exceeding in all 100*l.*, and shall assent to such terms, if any, as it shall be thought fit to impose.

With respect to other inferior courts there are several statutable provisions which restrain the removal of frivolous cases for the purpose of vexatious delay. Thus, by 21 Jac. 1, c. 23, it was enacted, that where the judge of an inferior court of record is a barrister of three years' standing no cause (unless as there excepted) shall be removed thence by any writ after issue or demurrer joined. Moreover, by 7 & 8 Geo. 4, c. 71, s. 6, that no cause under the value of 20*l.* shall be removed unless the defendant shall give security for payment of the debt and costs. And, lastly, the schedule annexed to the "Borough and Local Courts of Record Act, 1872" (which schedule may be applied by order in council to any local court or court of record), contains an express provision that no action shall be removed thence before judgment, except by leave of a judge of the superior court, and on such terms as he shall think fit (*h*).

(*h*) 35 & 36 Vict. c. 86, sched. r. 12; vide sup. p. 294.

CHAPTER XIII.

OF INJURIES PROCEEDING FROM OR AFFECTING THE CROWN.

WE proceed now to inquire into the manner of redressing those civil injuries or private wrongs to which the Crown is a party; and these may be either where the Crown is the aggressor or where it is the sufferer.

In treating therefore of these we will consider, first, the manner of redressing those injuries which a subject may suffer from the Crown, and then of redressing those, which the Crown may receive from a subject.

I. As to the method of redressing such injuries as the subject may receive from the Crown.

That the sovereign can personally do no wrong is a fundamental principle of the English constitution; yet, as observed in a former part of this work, his acts may in themselves be contrary to law, and subject on that ground to reversal.

For whenever it happens that, by misinformation or inadvertence, the Crown hath been induced to invade the private rights of any of its subjects, and the sovereign becomes by a proper representation informed of the injury sustained,—the law always then presumes that to know of any injury and to redress it, are inseparable in the royal breast; and issues as of course, in the sovereign's own name, an order to his judges to do justice to the party aggrieved (*a*).

(*a*) 3 Bl. Com. p. 255.

The distance between the sovereign and his subjects is such that it rarely can happen that any injury can proceed from the prince *to the person* of any private man; and the law in decency supposes that it never can or will happen at all; but injuries to the rights of *property* may be committed by the Crown, though scarcely without the intervention of its officers. And for these officers the law, in matters of right, entertains no respect or delicacy; but furnishes various methods of detecting the errors or misconduct of those agents, by whom the sovereign has been deceived and induced to do a temporary injustice (*b*).

As in ordinary cases, however, the sovereign himself is the medium through which justice is obtained, so no relief can in general be had against the Crown by an ordinary action (*c*); but only by such special forms of proceeding as the law has provided for this particular case (*d*).

[The methods of obtaining possession or restitution from the Crown, of either real or personal property, are 1st, by *petition de droit*, or petition of right (*e*); 2ndly, by

(*b*) 3 Bl. Com. p. 255.

(*c*) Jenkins, 78; Finch, L. 83. It is said, in some books, that, before the time of Edward the first, the king might be sued as a common person, the form being "*Præcipe Henrico regi Angliæ;*" but this seems of questionable authority. (See Bac. Ab. Prerog. E. 7.) Where the rights of the Crown, however, extend only to the superintendence of a public trust,—as in the case of a charity, or where its rights are only incidentally concerned, and no attempt is made to divest its possession or title,—the proceeding may be in Chancery, making the attorney-general defendant; and even when the object is to divest the title or possession of the Crown, the sovereign may refer it to the lord chancellor to do right; and may direct that the attorney-general shall be made a party to the proceedings in Chancery, to that purpose. (See Christian's Bl. vol. iii. p. 428; Balch *v.* Wastall, 1 P. Wms. 445; Reeve *v.* Attorney-General, 1 Ves. 445; Simpson *v.* Clayton, 4 Bing. N. C. 766; 2 Roll. Abr. 213; Mitf. Treat. on Pleading in Chancery.)

(*d*) No mention of this subject is made in the Judicature Act, 1873, or in the rules of procedure thereto annexed.

(*e*) It is to be remarked, that no petition of right lies to recover compensation for a wrongful act done by a servant of the Crown in the supposed performance of his duties, or to recover unliquidated damages for a trespass. (Tobin *v.* The Queen, 16 C. B., N. S. 310.)

[*monstrans de droit*, manifestation or plea of right (*f*). The former is applicable when the Crown is in possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the Crown, grounded on facts disclosed in the petition itself: in which case he must be careful to state truly the whole title of the Crown, otherwise the petition shall abate (*g*); and then, upon this answer being endorsed or underwritten by the Crown, *soit droit fait al partie*—let right be done to the party (*h*)—a commission shall issue to inquire into the truth of the suggestion (*i*). After the return to which, the attorney-general is at liberty to plead; and the merits shall be determined upon issue or demurrer, as in actions between subject and subject. Thus, if a disseisor of lands which are holden of the Crown dies seised without any heir, whereby the Crown is *primâ facie* entitled to the lands, and the possession is cast on it, either by inquest of office, or by act of law without any office found; now the disseisee shall, here, have remedy by petition of right,—suggesting the title of the Crown, and his own superior right before the disseisin made (*k*).]

But where the Crown is in possession under a title the facts of which are already set forth upon record, a party thereby aggrieved may have *monstrans de droit*; that is, may put in, in opposition to such recorded title, a claim of right grounded on certain facts relied upon by the claimant, without denying those relied upon by the Crown (*l*); and praying the judgment of the court,

(*f*) As to these remedies (the first of which is said to owe its origin to Edw. 1), see Co. Entr. 402, 419; Bro. Ab. tit. Prerog. 2; Fitz. Ab. tit. Error, 8; Smith *v.* Upton, 6 Man. & G. 252; Baron de Bode's case, 8 Q. B. 208; Simpson *v.* Clayton, 4 Bing. N. C. 766. See also Chitty's Treatise on the Prerogative of the Crown; where full information will be found as to the proceedings therein.

(*g*) Finch, L. 255.

(*h*) St. Tr. vii. 134.

(*i*) Skin. 608; Rast. Ent. 461.

(*k*) Bro. Ab. tit. Petition, 20; 4 Rep. 58.

(*l*) According to Blackstone (vol. iii. p. 256), a *monstrans de droit* is putting in a claim of right founded on facts already acknowledged and established. But it is clear that

whether upon those facts the sovereign or the subject had the right (*m*). As if, in the case before supposed, it be found by inquisition or inquest of office, (a proceeding that we shall have occasion presently to explain,) that a tenant of the Crown died seised without heir, whereby the Crown is *primâ facie* entitled,—the disseisee may have remedy by *monstrans de droit*, setting forth that he had been disseised by such tenant (*n*). And as the remedy by *petition* was extremely tedious and expensive, that of *monstrans* was much enlarged and rendered almost universal by several statutes (particularly 36 Edward III. c. 13, and 2 & 3 Edward VI. c. 8); which also allowed inquisitions of office to be *traversed* (or denied), whenever the right of a subject was concerned, except in a very few cases (*o*).

As to the effect of these proceedings, we may remark that if the right be determined against the Crown, the judgment is that of *ouster le main*, or *amoveas manus*, viz. "*quod manus domini regis amoveantur, et possessio restituetur petenti, salvo jure domini regis*" (*p*)—which last clause is always added to a judgment against the sovereign, to whom no laches is ever imputed; and whose right—till some modern statutes—has never been defeated by any limitation or length of time (*q*). And by such judgment the Crown is instantly out of possession; so that there needs not the indecent interposition of his own officers, to transfer the seisin, from the sovereign, to the party aggrieved (*r*).

The proceedings upon a petition of right have been made the subject of a modern statute (23 & 24 Vict. c. 34),

new facts may be introduced in a *monstrans de droit*. (See Co. Entr. 402.)

(*m*) 3 Bl. Com. 256.

(*n*) 4 Rep. 55; Bac. Abr. tit. Prerog. E. 7; Co. Entr. ubi sup.

(*o*) Skin. 608. See In re Ann Parry, Ex parte Duke of Beaufort, Law Rep., 2 Eq. Ca. 95.

(*p*) 2 Inst. 695; Rast. Ent. 463.

(*q*) See Finch, L. 460; and see 2 & 3 Edw. 6, c. 8, s. 14.

(*r*) Finch, L. 459.

under which it is provided that the petition shall be left with the secretary of state for the home department for her Majesty's consideration, who, if she shall think fit, may grant her fiat that right be done—on which fiat no fee or reward is to be taken; whereupon (the fiat having been served on the solicitor to the Treasury), an answer, plea, or demurrer shall be made on behalf of the Crown, and the subsequent proceedings be assimilated so far as practicable to the course of an ordinary action (*t*). And it is enacted, that, in cases in which a judgment of *amoveas manus* has heretofore been given on a petition of right, a judgment that the suppliant is entitled to the whole or some portion of the relief sought by his petition under this Act, or to such other relief, and in such terms and conditions, as the court may think right, may be given instead, which shall have the same effect as a judgment of *amoveas manus* (*u*). Upon any petition of right under this Act, it is also provided that *costs* shall be payable both to and by the Crown; subject to the same rules, so far as practicable, as obtain in proceedings between subject and subject (*x*). It is, however, provided that nothing in the Act, shall prevent any suppliant from proceeding in the same manner as he might have done before it passed.

II. The method of redressing such injuries as the Crown may receive from the subject are—

1. [By such usual actions, as are consistent with the royal prerogative and dignity. But as the sovereign by reason of his legal ubiquity, cannot be disseised or dis-

(*t*) The plea may be *double*. Tobin *v.* The Queen, 14 C. B., N. S. 505; 16 C. B., N. S. 310.

(*u*) 23 & 24 Vict. c. 34, ss. 9, 10.

(*x*) Sect. 12. As to the *certificate* for costs against the Crown, given by the judge dealing with the petition, to the Commissioners of the Treasury (or in matters affecting the Crown in its private capacity, to the Treasurer of the Household,) see sects. 13, 14, et sched. No. 5. The proceedings in a petition of right under this Act will be found set forth in Tobin *v.* The Queen, ubi sup.

[possessed of any real property which is once vested in him, so he can maintain no action which supposes the dispossession of the plaintiff, such as an ejectment (*y*): though he may bring a *quare impedit*, which always supposes the complainant to be seised or possessed of the advowson. So too the sovereign may bring an action of trespass for taking away his goods, for breaking his close, or other injury done to his soil or possession (*z*): but such actions (though in strictness maintainable) are not usually brought at the suit of the Crown. It would be equally tedious and difficult to run through every minute distinction, that might be gleaned from our books with regard to this matter (*a*); nor is it in any degree necessary, as much easier and more effectual remedies are usually obtained by such prerogative modes of process as are peculiarly confined to the Crown.

2. Amongst these prerogative methods, is that of *inquisition* (or *inquest*) *of office* (*b*): which is an inquiry made by the sovereign's officer, his sheriff, coroner, or escheator, either *virtute officii*, or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the Crown to the possession of lands or tenements, goods or chattels; and this is done by a jury of no determinate number—being either twelve, or less, or more (*c*). As to inquire whether the Crown's tenant for life died seised, whereby the reversion accrues to the sovereign—whether A., who held immediately of the Crown, died without heir; in which case the land must belong to the sovereign by escheat—whether B. be an idiot *a nativitate*, and there-

(*y*) Bro. Ab. tit. Prerog. 89.

(*z*) Ibid. 130; F. N. B. 90; Y. B. 4 Hen. 4, pl. 4.

(*a*) Some of these are discussed in the case of Attorney-General *v.* Lord Churchill, 8 Mee. & W. 172.

(*b*) As to the form of, and proceedings in, an inquisition of office, see 12 & 13 Vict. c. 109, s. 30 et seq. See also Dean *v.* Reginam, 15 Mee. & W. 475.

(*c*) Finch, L. 323, 425.

[fore, together with his lands, appertains to the custody of the sovereign; and other questions of like import, concerning both the circumstances of the tenant, and the value or identity of the lands. These inquests of office were more frequently in practice during the continuance of the military tenures amongst us than at present; for then, upon the death of any tenant of the Crown, such inquest was held, called an *inquisitio post mortem*, to inquire of what lands he died seised, who was his heir and of what age, in order to entitle the king to his marriage, wardship, relief, *primer seisin*, or other advantage, as the circumstances of the case might turn out (*d*). To superintend and regulate these inquiries, the court of wards and liveries was instituted by statute 32 Hen. VIII. c. 46; but abolished at the restoration of King Charles the second, together with the oppressive tenures upon which it was founded. With regard to the other matters above referred to, the inquests of office still remain in force, and are taken upon proper occasions; being extended not only to lands, but also to goods and chattels personal,—as in the case of wreck, treasure trove and the like.] But the most frequent occasion for them was to ascertain forfeitures for offences—as whether B. be attainted for treason, or whether C., lying dead, had died feloniously by his own hands and the like; and this occasion no longer exists; it having been enacted by the Felony Act, 1870, (33 & 34 Vict. c. 23,) that no inquest of any treason, felony, or *felo de se*, shall cause any forfeiture or escheat (*e*).

[These inquests of office were devised by law as an authentic means to give the sovereign his right by solemn matter of record. For it is a part of the liberties of England, and greatly for the safety of the subject, that the sovereign may not enter upon or seize any man's possessions, upon bare surmises, without the inter-

(*d*) Vide sup. vol. I. p. 198. (*e*) 33 & 34 Vict. c. 23, s. 1.

[vention of a jury (*f*). And it was by the statute 18 Hen. VI. c. 6, enacted that all grants of forfeited lands and tenements, before *office found* or returned into the Exchequer, should be void. And by the Bill of Rights at the Revolution, (1 W. & M. st. 2, c. 2,) it was declared, that all grants and promises of fines and forfeitures of particular persons before conviction, (which is here the inquest of office,) were illegal and void; which indeed was the law of the land, in the reign of Edward the third (*g*).]

There are cases, however, in which the Crown is entitled without office found: the inquest, if held, being only for the better instruction of the officer before seizure: and to protect the subject from the adoption of hasty measures(*h*). And though the rule formerly was, that where a common person cannot have possession without entry, the sovereign cannot have it without an office, yet now it is otherwise (*i*); for by 22 & 23 Vict. c. 21, s. 25, it was enacted, that when any right of re-entry upon lands or other hereditaments shall have accrued to the Crown, such right may be exercised or enforced without any inquisition taken or office found, or any actual re-entry being made on the premises. As to the effect of these inquests when taken, it may be laid down as generally true with regard to real property, that if an office be found for the sovereign, and the land be not held at the time by a stranger, it puts the Crown into immediate possession, without the trouble of a formal entry; and the Crown shall receive all the mesne or intermediate profits from the time that its title accrued (*k*). As on the other hand by the *Articuli super chartas*, if the king's escheator or sheriff seize lands into the king's hand, without cause, upon taking them out

(*f*) Sheffeild *v.* Ratcliffe, Hob. 347; Gilb. Hist. Ex. 132.

(*g*) 2 Inst. 48.

(*h*) See Gilb. Exch. 109, 13, 4; 16 Vin. Ab. 79, Office, B.; 12 East, 102.

(*i*) See Chit. Prerog. 249.

(*k*) 3 Bl. Com. 260, cites Finch, L. 325, 326.

of the king's hand again, the party shall have the mesne profits restored to him (*m*).

In order to avoid the possession of the Crown acquired by the finding of such office, the subject may have his petition of right, or *monstrans de droit*, or he may traverse the inquisition,—according to the distinctions which we have already had occasion to explain (*n*). He is, also, under the provisions of a recent statute (28 & 29 Vict. c. 104, s. 52), in case he thinks himself aggrieved by any description of boundary or other finding on the inquisition, entitled to file a statement of his objection thereto; which may thereupon be directed by the Court to be inquired into by a fit person, on whose return in writing, differing in effect from the inquisition, the latter shall be deemed to be altered so as to conform with the return.

3. Upon all debts of record due to the Crown, the sovereign has his peculiar remedy by writ of *extent* (*o*); which differs in this respect from an ordinary writ of execution at suit of the subject, that under it both the lands and goods of the debtor may be taken at once, in order to compel the payment of the debt (*p*). And this proceeding is called an *extent*, from the words of the writ; which directs the sheriff to cause the lands, goods and chattels to be appraised at their full, or extended, value (*extendi facias*), before they are delivered to satisfy the debt. A debt of record as regards the Crown, is subject in general to the same definition, as in the case where the party to

(*m*) 28 Edw. 1, st. 3, c. 19.

(*n*) Vide sup. pp. 656, 657.

(*o*) With respect to debts *not* of record, viz. simple contract debts, and bonds, and other specialties, (not falling within the stat. of 33 Hen. 8, c. 39,)—no extent can be granted on these, till a commission has first issued, under which an inquisition is taken to find the debt; and when such debt is returned on the inquisition, it becomes a debt on record, on which an extent may issue. (Chit. Prerog. 267.) As to the proceedings on such inquisition, see R. *v.* Ryle, 9 Mee. & W. 227.

(*p*) See 8 Rep. 12 b; Gilb. Ex. 7; 3 Bl. Com. 420; 2 Saund. by Wms. 70. As to the writ of extent, see also Williams on Real Property, p. 76, 5th ed.

whom it is due is a subject. But there are several instances in which a debt is so ranked in favour of the Crown, by way of exception from the general rule, and by force of its special prerogative. For, first, it having been provided in the case of debts acknowledged on statute merchant or statute staple, that upon forfeiture of these, execution might issue at once, both against lands and goods (*q*),—it was by 33 Hen. VIII. c. 39, afterwards enacted, among other provisions, that *all* obligations made to the king shall have the same force, and of consequence the same remedy to recover them, as a statute staple (*r*). Moreover, by statute 13 Eliz. c. 4, the lands of all such treasurers, and other officers as therein mentioned, shall be liable to the Crown debts due on their accounts, in the same manner as if on the day they first became officers or accountants, respectively, they had stood bound by writing obligatory having the effect of statute staple (*s*). And by 43 Geo. III. c. 99, s. 41, and 5 & 6 Will. IV. c. 20, s. 13, duties detained in the hands of tax collectors may be recovered as a debt upon record to the Crown, with all costs and charges (*t*).

An extent for recovery of the Crown's debt issues from the Exchequer, as being the court principally presiding over all matters relating to the royal revenue (*u*). And it commissions the sheriff to take an inquisition (or inquest of office) on the oaths of lawful men, to ascertain the lands, goods and debts of the defendant; and to seize the same into the hands of the sovereign. It is, however,

(*q*) Vide sup. vol. I. p. 300; 2 Saund. 69 b.

(*r*) 3 Bl. Com. 420; R. *v.* Lamb, 3 Price, 649. Whether the general right of the Crown to have execution by extent upon all debts of record, rests upon the provisions of this statute, or on the common law, has been questioned. See Bl. Com. ubi sup.; 3 Rep. 12; Ex. Gilb. 7.

(*s*) R. *v.* Rawlings, 12 Price, 834; R. *v.* Fernandez, ibid. 862.

(*t*) R. *v.* Wrangham, 1 Tyrw. 383.

(*u*) Accordingly, under the Judicature Act, 1873, it would seem that proceedings on an extent would be assigned to the Exchequer division of the High Court of Justice thereby established. (36 & 37 Vict. c. 66, s. 34.)

in general, necessary that the extent should be preceded by a *scire facias* (*u*), in order to bring the defendant into court, and afford him an opportunity of showing that it ought not to issue (*x*); though, on the other hand, in cases where there is danger of the debt being lost, an *immediate* extent may be directed to issue, (*i.e.* an extent without either commission of inquest or *scire facias*,) upon affidavit of the circumstances (*y*). In ordinary cases, the writ having issued, and the inquisition taken, and the seizure made under it by the sheriff being returned into court, the defendant, if he means to dispute the debt,—or any third person, who thinks proper to advance a claim to the property set forth in the inquisition,—must enter an appearance for that purpose; when he will be permitted to plead to the extent. In such pleading the defendant was allowed by statute 33 Hen. VIII. c. 39, s. 79, to allege or show any good and sufficient "matter in law, reason, or good conscience," in bar or discharge of the debt: but, as he is found by the inquisition itself to be the owner of the lands and chattels, it is unnecessary for him to claim in his pleading any property in them. If he succeeds in showing matter in bar or discharge of the Crown debt, his right to the property in question is of course incontestable (*z*). On the other hand, where a third party is let in to plead to the extent, he is not entitled to deny the debt due from the defendant to the Crown: but, by his plea, he must show a title in himself to the lands or chattels; and either traverse, or confess and avoid, the title of the Crown,—or, what is the same thing, that of the debtor against whom the writ issued (*a*). Issue of law or fact being joined, it is decided either on demurrer, or by trial by jury, pursuant in general

(*u*) Chit. Prerog. 271. As to a *scire facias* at the suit of the Crown, see 12 & 13 Vict. c. 109.

(*x*) Chit. Prerog. 271.

(*y*) Ibid. 277. See 28 & 29 Vict. c. 104, s. 47.

(*z*) Chit. Prerog. 367.

(*a*) Ibid. 368. As to the practice in such cases, see R. *v.* Randall, 5 Price, 576; R. *v.* Lambton, ibid. 421; R. *v.* Soulby, 1 Y. & C. 249.

to the ordinary course of practice in actions between subject and subject; and is followed by judgment (*b*). Which, when given for the Crown, is that the subject takes nothing by his traverse or plea; if given either for the debtor, or the third party let in to plead, is an award of *amoveas manus* (*c*). Upon this judgment an appeal lies, provided the consent of the attorney-general to that proceeding be previously obtained (*d*).

With respect to the *effect* of an extent, the lands of a Crown debtor are bound, in general, from the time when the debt became one of record (*e*); which, in the case of such bonds as are mentioned in 33 Hen. VIII. c. 39, s. 50, is from the time the bonds are executed. However, even at common law, debts (though not of record), due from certain known public officers and accountants to the Crown, bound the debtor's *lands* from the time they accrued due; and the 13 Eliz. c. 4, extends the common law exception, by providing that arrears due from tellers, receivers and such other officers as are mentioned therein, shall bind their lands from the time when they entered into the offices (*f*). As for the *goods* of the debtor, they are bound from the *teste* (or date) of the extent (*g*); and the rule seems to be the same as to any debts owing to him (*h*). It is also provided by 33 Hen.

(*b*) By 22 & 23 Vict. c. 21, s. 17, the judges were authorized to try such issues of fact on their several circuits, without any *special* commission.

(*c*) R. *v.* Evans, 6 Price, 480.

(*d*) Chit. Prerog. 373. As to the sale of land seized under an extent or other process of execution for the Crown, see 25 Geo. 3, c. 35; Geo. III. *v.* De la Motte, 2 H. & N. 589; 28 & 29 Vict. c. 104, s. 50. If the property seized be chattels, the sale takes place under a writ of *venditioni exponas*.

(*e*) 2 Roll. Ab. 156, B. pl. 1.

(*f*) Wilde *v.* Forte, 4 Taunt. 334; Chit. Prerog. 294; 3 Bl. Com. 420. As to the estate of a *public accountant*, sold under an extent, &c., see 1 & 2 Geo. 4, c. 121, s. 10.

(*g*) Chit. Prerog. 285; 1 Saund. by Wms. 219 g.

(*h*) Bl. Com. ubi sup. See Chit. Prerog. 304; R. *v.* Lambton, 5 Price, 428. As to the effect on partnership property, see R. *v.* Saunderson, Wightw. 50; Shears *v.* Lord Advocate, 6 Clarke & Fin. 180.

VIII. c. 39, s. 74, that the Crown's debt shall, in suing out execution, be preferred to that of every other creditor, who hath not obtained judgment before the Crown commenced its action (*i*). On the other hand, however, it has been enacted by 28 & 29 Vict. c. 104, s. 48, that no debt due to the Crown, on judgment, decree, order, recognizance, inquisition of debt, obligation, or specialty,—nor any acceptance of office under the Crown,—shall affect any lands as to *bonâ fide* purchasers or mortgagees, (with or without notice,) unless a writ of execution has been issued and *registered* before the execution of the conveyance or mortgage and payment of the money. While with regard to the *exoneration* of such lands, it has been provided that whenever a *quietus* shall be obtained by a debtor or accountant to the Crown—and an office copy thereof left with the senior Master of the Common Pleas, together with a certificate signed by the paymaster-general, that the same may be registered,—the Master shall forthwith enter the same in the said book accordingly (*k*). And also that it shall be lawful for the lords of the Treasury, (or any three of them,) by writing under their hands,—upon payment of such sums as they shall think fit to require into the receipt of Her Majesty's exchequer, to be applied in liquidation of the debt or liability of any debtor or accountant to the Crown, or upon such other terms as they may think proper,—to certify that any lands, tenements or hereditaments of any such Crown debtor or accountant shall be held by the purchaser or mortgagee, or intended purchaser or mortgagee thereof, wholly exonerated from all further claim of the Crown; or, in cases of leases for fines, to certify that the lessee shall hold the premises exonerated in like manner, without prejudice to the right of the Crown to the reversion upon such lease, and the rents and covenants

(*i*) As to the priority of the Crown in cases of extent, see Edwards *v.* Reginam, 9 Exch. 628.

(*k*) 2 & 3 Vict. c. 11; and see 18 & 19 Vict. c. 15; 22 & 23 Vict. c. 35, s. 22; 23 & 24 Vict. c. 115, et sup. p. 458, n. (*m*).

reserved by the same: and that thereupon the same lands, tenements and hereditaments shall respectively be held exonerated as aforesaid (*l*).

Such is in general the state of the law relating to the principal kind of extent, called an extent *in chief*. Besides this, however, there is an extent *in aid;* which issues, not at the suit of the Crown, like an extent in chief, but at the suit or instance of the Crown debtor against a person indebted to the Crown debtor himself (*m*). And it is grounded on the Statute of Extent, 33 Hen. VIII. c. 39, and on the principle that the Crown is entitled to the debts due to its debtor. The writ sued out in this case directs the sheriff to seize the debts, specialties and sums of money due to the Crown debtor; the effect of which is to cause an inquisition and seizure to be made of such debts for the Crown's use (*n*); though by consent of the Crown the produce of the extent may be paid over to the Crown debtor, (or prosecutor,) himself. This practice of issuing extents in aid, was at one time carried to so great a length, (particularly by issuing them for larger sums than were in fact due to the Crown from the prosecutor,) as to enable Crown debtors in almost every case to convert to their own benefit a species of execution properly belonging to the Crown; and thereby to obtain an undue preference as regards other creditors; but the resort to extents in aid was subjected, by 57 Geo. III. c. 117, to restraints which tended to the rectification of this abuse (*o*). There is also a special writ of extent, which

(*l*) We may take occasion to remark here that a purchaser is bound to know not only whether the owner of the land is a Crown debtor, but also whether there is any suit pending (*lis pendens*) concerning it. As to these, see 30 & 31 Vict. c. 47.

(*m*) As to the persons entitled to extents in aid, see R. *v.* Gibbs, 7 Price, 633; R. *v.* Tarleton, 9 Price, 647; R. *v.* Kynaston, 11 Price, 598.

(*n*) As to what may be seized, see R. *v.* Lushington, 1 Price, 94; R. *v.* Hunter, 4 Price, 258; R. *v.* Lambton, 5 Price, 428.

(*o*) It has been the practice that no fiat for an extent in aid shall be issued, without affidavit that there will otherwise be danger of the debt being lost to the Crown. We may

is issued in the event of the death of a Crown debtor; and is called a *diem clausit extremum*, becauses it recites the death of the party (*p*). By this writ (which issues on an affidavit of the debt and death) the sheriff is commanded to take and seize the chattels, debts and land of the debtor who has so died, into the hands of the Crown (*q*).

As to the course of proceeding and law relative to an extent in aid, and *diem clausit extremum*, in any particular not above specified,—it is in general similar to that which prevails upon an extent in ordinary cases.

4. [When the Crown hath unadvisedly granted any thing by letters patent which ought not to be granted; or where the grantee hath done some act that amounts to a forfeiture of the grant; the remedy to repeal the patent is by writ of *scire facias* (*r*). This may be brought either on the part of the Crown, in order to resume the thing granted: or, if the grant be injurious to a subject, the Crown is bound of right to permit him, (upon his petition,) to use the royal name for repealing the patent, in a *scire facias* (*s*). And so, also, if, upon office untruly found for the Crown, the land is granted over to another, —he who is grieved thereby, and traverses the office itself, is entitled before issue joined to a *scire facias* against the grantee, in order to avoid the grant (*t*).

remark here, that there is also an extent *in chief in the second degree*, which differs from the extent *in aid* in this—that the first is a proceeding by the Crown *proprio motu* against the debtor of him against whom an extent in chief has issued; the latter is where the extent is issued at the instance of a Crown debtor against his debtor, to aid his payment of the Crown debt. The stat. 57 Geo. 3, c. 117, has been held not to apply to extents in chief in the second degree. (See R. *v.* Shackle, 11 Price, 772; Reg. *v.* Adams, 2 Exch. 299.)

(*p*) See Ex parte Hippesley, 2 Price, 379; R. *v.* Hodge, 12 Price, 537; R. *v.* Hassell, M'Clel. 105; R. *v.* Lord Crewe, 5 Dowl. 158.

(*q*) See 28 & 29 Vict. c. 104, s. 47. Formerly the issuing of the writ was preceded by an inquest by the sheriff.

(*r*) 3 Lev. 220; 4 Inst. 88.

(*s*) R. *v.* Butler, 2 Ventr. 344.

(*t*) Bro. Ab. tit. Scire Facias, 69, 185.

[5. An *information* on behalf of the Crown, exhibited by or in the name of the attorney-general, is a method of proceeding for obtaining satisfaction in respect of an injury to any of the possessions of the Crown (*u*). It is instituted to redress a private wrong by which the property of the Crown is affected, thus differing from an information filed in the Queen's Bench,—of which we shall treat in the next Book—which is calculated to punish some public wrong or heinous misdemeanor in the defendant (*x*). The most usual informations are those of intrusion (*y*) and of debt (*z*): of *intrusion*, for any trespass committed on the lands of the Crown (*a*),—as by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, and the like,—and of *debt*, for monies due to the Crown upon the breach of a penal statute (*b*). This is most commonly used to recover forfeitures occasioned by transgressions of those laws which are enacted for the establishment and support of the revenue; the penalties inflicted by the laws which regard matters of police and public convenience, being usually left to be enforced by common informers, in *qui tam* actions. But after the attorney-general has informed upon a breach of the penal law, no other information can be received (*c*). There is also an information *in rem*, when any goods are supposed to become the property of the Crown, and no man appears to claim them or to dispute its title;—as antiently in the case of treasure-trove, wrecks, waifs, and estrays, seized by the Crown's officer

(*u*) See Yelverton's case, Moor, 875; Att.-Gen. *v.* Edmunds, Law Rep., 6 Eq. Ca. 381.

(*x*) Vide post, bk. VI. c. XVIII.

(*y*) See 4 Rep. 58 a; Attorney-General *v.* Parsons, 2 M. & W. 23; Attorney-General *v.* Hill, ibid. 160.

(*z*) See Attorney-General *v.* Sewell, 4 Mee. & W. 77.

(*a*) See Nannge *v.* Rowland ap Ellis, Cro. Jac. 212; Lord Vaux's case, 1 Leon. 49; Attorney-General *v.* Lord Churchill, 8 Mee. & W. 171. As to information of intrusion in respect of a royal forest, see Attorney-General *v.* Hallett, 1 Exch. 211.

(*b*) See 41 Geo. 3, c. 90, as to enforcing, in Ireland, payment of Crown debts recovered in England, and *vice versâ*.

(*c*) Hard. 201.

[for its use. Upon such seizure an information was usually filed in the Exchequer, and thereupon a proclamation was made for the owner, (if any,) to come in and claim the effects; and at the same time there issued a commission of *appraisement* to value the goods in the officer's hands: after the return of which, and a second proclamation had, if no claimant appeared, the goods were supposed derelict, and condemned to the use of the Crown (*d*). And when, in later times, forfeitures of the goods themselves, as well as personal penalties on the parties, were inflicted by Act of Parliament for transgressions against the laws of the customs and excise,—the same process was adopted in order to secure such forfeited goods to the public use, though the offender himself had escaped the reach of justice.]

Finally, we may remark, that in all informations and other legal proceedings by or on behalf of the Crown in matters relating to the *public revenue*, the costs are now, by 18 & 19 Vict. c. 90, ss. 1, 2, placed upon the same footing as in actions between subject and subject (*e*); though, by the general rule, as it stands independently of this statute, the Crown neither pays nor receives costs (*f*). And further, that by a recent statute the proceedings in the Exchequer by way of information, and in other matters relating to the revenue, were simplified and assimilated, in many respects, to the procedure in ordinary actions (*g*).

[We have now gone through the whole circle of civil injuries, and the redress which the laws of England have

(*d*) Gilb. Hist. Exch. c. 13.

(*e*) By 25 Vict. c. 14, the provisions of this statute were extended to the *Isle of Man*.

(*f*) See 24 Hen. 8, c. 8; 8 Bl. Com. 400; 25 Geo. 3, c. 35; Attorney-General *v.* Shillibeer, 4 Exch. 606; The Queen *v.* Beadle, 7 Ell. & Bl. 492. In Blackstone's opinion, (vol. iii. p. 400,) "it seems reasonable "to suppose, that a queen consort "participates in this privilege of the "Crown as regards costs."

(*g*) 28 & 29 Vict. c. 104. See also 18 & 19 Vict. c. 90, and 22 & 23 Vict. c. 21.

[anxiously provided for each. In which the student cannot but observe, that the main difficulty which attends their discussion, arises from their great variety: which is apt at our first acquaintance to breed confusion of ideas, and a kind of distraction in the memory. A difficulty not a little increased by the very immethodical arrangement in which they are delivered to us by our antient writers, and the numerous terms of art in which the language of our ancestors has obscured them. For terms of art, there will unavoidably be in all sciences; the easy conception and thorough comprehension of which must depend upon frequent and familiar use; and the more subdivided any branch of science is, the more terms must be used to express the nature of these several subdivisions, and mark out with sufficient precision the ideas they are meant to convey. But this difficulty, however great it may appear at first view, will shrink to nothing upon a nearer and more frequent approach; and indeed be rather advantageous than of any disservice, by imprinting on the mind a clear and distinct notion of the several remedies. And, such as it is, it arises principally from the excellence of our English laws; which apply their redress exactly to the circumstances of the injury, and do not furnish one and the same proceeding for different wrongs which are impossible to be brought within one and the same description; whereby every man knows what satisfaction he is entitled to expect from the courts of justice; and as little as possible is left in the breast of the judges, whom the law appoints to administer, and not to prescribe, the remedy.]

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